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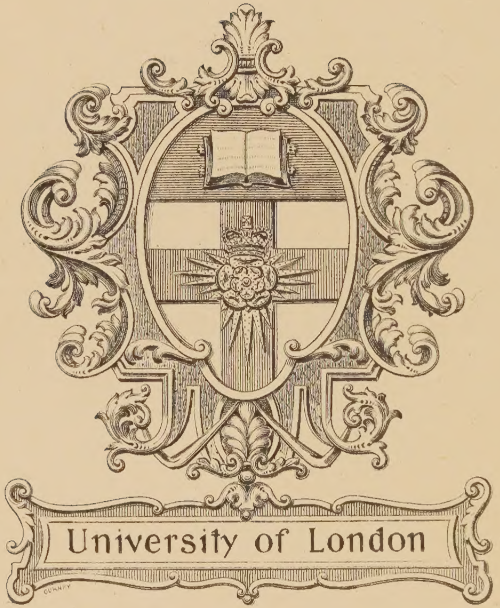
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1945

THE
LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
AND
PEERAGE CASES.

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BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[PRIVY COUNCIL.]

J. C.*
1944
Oct. 17.

TRINIDAD LAKE ASPHALT OPERATING COMPANY, LIMITED . . . APPELLANT;

AND

COMMISSIONERS OF INCOME TAX FOR TRINIDAD AND TOBAGO . . . RESPONDENTS.

Distinguished.
INLAND REVENUE COMMRS. *v.* GORDON
[1952] A.C. 552

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad and Tobago—Revenue—Income tax—Company—Dividend—Transmission to non-resident abroad—Cancellation of equal debt—Book entries—Liability of company to tax as statutory agent—Income Tax Ordinance, Revised Ordinances, 1940, (*c.* 33), *No.* 1, *ss.* 5, 30.

Where the appellant company, incorporated and carrying on business in the colony, mutually agreed with a non-resident shareholder, who was not carrying on business in the colony, that a specified dividend on the non-resident's shares should be paid by the cancellation of the appellant company's claim in a like amount against the non-resident for goods sold, and the transaction was effected by each party making corresponding entries.

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* *Present:* VISCOUNT SIMON, L.C., LORD WRIGHT, LORD PORTER, LORD SIMONDS and LORD GODDARD.

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in its books, there was an actual payment and receipt of the indebtedness on either side, and a " transmission " of " revenue " within the meaning of s. 30 of the Income Tax Ordinance, 1940, from the appellant company to the non-resident, with the consequence that the former became liable thereunder as statutory agent for the amount of the tax. A receipt of anything by a person who is at a distance from the sender involves a transmission.

Dictum of Mellish L.J. in *In re Harmony & Montagu Tin & Copper Mining Co., Spargo's Case* (1873) L. R. 8 Ch. 407, 414, and of Lord Lindley in *Gresham Life Assurance Society* v. *Bishop* [1902] A. C. 287, 296, referred to.

Order of the Supreme Court affirmed.

Appeal (No. 55 of 1942) from an order of the Full Court of the Supreme Court of Trinidad and Tobago (April 1, 1942), on a case stated for the opinion of the Full Court by Perez J., whereby he dismissed an appeal by the appellant against an assessment to income tax made by the respondents, the Commissioners of Income Tax for the colony, on the appellant under s. 30 of the Income Tax Ordinance, 1940 (c. 33), No. 1 (1). The appeal was also against the order of Perez J. (May 16, 1942) whereby, in accordance with the judgment of the Full Court, he formally dismissed the appeal of the appellant against the assessment.

The following facts are taken from the judgment of the Judicial Committee. The assessment was on the sum of $1,394,227.00, and was for the year 1940, the tax chargeable being $336,424.75. The assessment was made in respect of a dividend, amounting to $1,207,817.06, declared by the appellant in favour of the Barber Asphalt Corporation of New Jersey, U.S.A. (hereinafter called " Barber ") as the holder of 499,992 shares out of 500,000 shares constituting the issued capital of the appellant. The business of the appellant was to win and refine asphalt in the colony and to sell and deliver it to purchasers, including Barber. The dividend was declared in accordance with a resolution of the appellant's directors, dated November 24, 1939, on which date Barber owed to the appellant $1,207,817 for asphalt purchased by it from the appellant. The resolution was in the following terms: " Resolved that a dividend in the amount of $1,207,817.06

(1) By s. 30 of the Income Tax Ordinance: " Any resident " agent, trustee, mortgagor, or " other person who transmits " rent, interest, or income derived " from any other source within the " colony, to a non-resident per- " son shall be deemed to be the " agent of such non-resident per- " son and shall be assessed and " shall pay the tax accordingly."

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" be declared payable by cancellation of the Trinidad Lake " Asphalt Company's claim in a like amount against Barber " Asphalt Corporation and that in addition a cash dividend of " equal proportion amounting to $12.10 be paid to local " shareholders making a total of $1,207,829.16." Barber was at all material times non-resident in the colony. It carried on business at its head office in Barber, New Jersey, United States. It had no place of business in the colony, and had never exercised or carried on any trade or business there. The transaction in question was carried out by each party making corresponding entries in its books, and the main question in this appeal, which was decided adversely to the appellant by Perez J. and by the Full Court of the Supreme Court (Gerahty C.J., Vincent Brown and Smith JJ.), was whether by the transaction the appellant had " transmitted " the dividend to Barber within the meaning of s. 30 of the Ordinance.

1944. July 20, 24, 25. *Tucker K.C.* and *Mustoe* for the appellant. It is not contested that the dividend was income in the hands of Barber within the meaning of s. 5 of the Ordinance (1) on which Barber was liable to tax. The argument may be put on two grounds : (*a*) Section 30 is not applicable to the appellant. It cannot be said that the appellant " transmitted " income, because s. 30 requires that the person transmitting must be a sort of go-between. " Other person " in s. 30 does not comprise a case where the person is himself, as it were, the source of the income. (*b*) Section 30 requires that some asset representing income shall have passed out of the colony to some person abroad, and there is no transaction in this case on that footing. Nothing left the colony. All that happened was that two debts were set off, one against the other. The appellant had a lien on the dividend for the full amount of its debt, and could have enforced it by refraining from transmitting the dividend or paying it, and it simply set off the debt and extinguished it. All that the resolution did was to give effect to the lien. There was never an agreement that the appellant would send a dividend to Barber in America. Even if the declaration of the dividend created a debt due to Barber by the appellant, the declaration conferred no right on Barber to receive payment of that debt in money, or to receive payment of it in the United States of America. Any debtor may, by the contract which gives rise to the debt, localize the place of payment, and the appellant localized its obligation as to payment to the place where Barber would have had to pay its own debt to the appellant. If " transmission " means " payment," then there has been no payment, for a set-off is not a payment. If Barber had come to the colony and collected its debt there, there would not have been a transmission out of the colony as required by the section. The general rule is that Barber had to pay its debt in Trinidad, and by agreement the dividend was set off there, and, therefore, it was satisfied there. On the footing that the declaration and satisfaction of the dividend gave rise to notional cross payments, those cross payments both took place in the colony, and there was no transmission of money or property out of the colony. The transaction did not give rise to notional cross payments, however. It amounted to a set-off, which is the antithesis of a payment, for you are released from payment of the debt which has been set-off. In any event, no assessment on the appellant was competent in view of the provisions of s. 26, sub-s. 4, of the Ordinance (1), the appellant not being the regular agent of Barber.

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(1) By s. 5 : " Income tax shall " . . . be payable . . . upon the " income of any person accruing " in, derived from, or received in, " the colony in respect of :— " . . . (*d*) dividends . . . ."

Sir Donald Somervell A.-G. and *Reginald Hills* for the respondents. Section 30 should be read as " any person who " transmits income derived from any source in the colony " to a non-resident shall be deemed to be the agent of such " non-resident person and shall be assessed and shall pay the " tax accordingly." The appellant's first point was that the company could not transmit because a person transmitting must be an intermediary. " Transmit " is used otherwise in this very section—" any . . . mortgagor . . . who trans- " mits . . . ."—so that argument falls. On the second point —the general meaning of the word " transmit "—it is a perfectly apt word to apply in this case whether the person who " sends across " is a principal, a tenant paying his rent,

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(1) By s. 26, sub-s. 4 : " Nothing " in this section shall render a " non-resident person chargeable " in the name of a broker . . . " or other agent where such . . . " agent is not an authorised per- " son carrying on the regular " agency of the non-resident " person . . . ."

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a bank sending money to another bank, a government transmitting sterling balances abroad, mortgagors transmitting their interest, or a company transmitting a sum in respect of dividends. On the appellant's point that s. 30 requires that there shall be something leaving the colony, s. 30 does not say anything about transmitting abroad, it simply says "transmits . . . to a non-resident." However, putting the argument on the assumption that it must be shown that there was a transmission to New Jersey, this kind of point has been dealt with in various connexions, and, although the language is not precisely the same in all the cases, the words here are a fortiori those used in the authorities. *In re Harmony & Montagu Tin & Copper Mining Co., Spargo's Case* (1) is very strong. There the court had to decide whether there was "payment in cash"—difficult words to satisfy except by the handing over of specie or something like that. In *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (2) the word was "received." It was a rather loose case of set-off. The mere fact, however, that there is an entry in books of interest received abroad does not entitle the Crown to say that it has been received in the United Kingdom: *Forbes* v. *Scottish Provident Institution* (3). *Universal Life Assurance Society* v. *Bishop* (4) was a real transmission case. *Gresham Life Assurance Society* v. *Bishop* (5) assists the respondents. Even the settling of an account may be equivalent to the receipt of a sum of money. After the declaration of the dividend and the set-off Barber's income account was increased by the amount of the dividend, and in those circumstances it can be said that the dividend had been transmitted to them. Lastly, in *Tarrant* v. *Roberts* (6) it was said that "one shall "be set against the other, and, in my judgment, that is "payment." There the words were "received repayment." Section 30 plainly applies here. There has been a transmission, and a transmission by set-off is one of the commonest incidents in the relationship between firms, bankers and concerns of one country and another.

Hills followed.

Tucker K.C. in reply. The word is "transmit," not "paid." Even had it been "paid" it was held in *Hunter* v.

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(1) (1873) L. R. 8 Ch. 407, 412.

(2) (1886) 2 Tax Cas. 165.

(3) (1895) 3 Tax Cas. 443.

(4) (1899) 4 Tax Cas. 139.

(5) [1902] A. C. 287.

(6) (1930) 15 Tax Cas. 754, 759.

Regem (1) that a premium on an insurance policy met by borrowing it from the insurance company had not been "paid" by the policy holder: see also *Rex* v. *Special Commissioners of Income Tax. Ex parte Horner* (2). With regard to the *Gresham Life Assurance Society's* case (3), and accepting that there was here a payment of this dividend by the appellant to Barber, reliance is placed on the words of Lord Lindley: "Has that sum been received in this country . . . "no one here has received that sum . . . No account even "is forthcoming to shew that the sum has ever been treated "as remitted here . . . . The locality of the receipt is "made all important, and it is only by ignoring it or by "introducing the expression 'constructive receipt'—which "may mean anything—that the claim of the Crown can be "supported." (4) "Transmit" in this Act means that something has to go out of the colony, but by the operation of this set-off Barber received the dividend in the colony and nowhere else.

Oct. 17. The judgment of their Lordships was delivered by LORD WRIGHT, who stated the facts and continued: If the appellant fails in its objections in law to the assessment it does not now dispute that the amount of the tax is correct. It was not in question that the resolution declaring the dividend ought properly to be construed as compendiously embodying two items—(1), the declaration of a cash dividend of $1,207,817.06 in favour of Barber; (2), an agreement between Barber and the appellant that the dividend was payable by cancellation of the appellant's claim against Barber for asphalt sold and delivered to Barber. Perez J. held that the dividend was income of Barber accruing in, or derived from, the colony within the meaning of s. 5 of the ordinance, and that Barber was, accordingly, liable to tax on the dividend. The appellant does not dispute that part of the judgment. It is clearly right, and is in accordance with priciples laid down by the House of Lords in regard to the territorial limits within which the imposition of income tax is permissible. To quote one statement, it was said by Lord Herschell in the leading case of *Colquhoun* v. *Brooks* (5): "The Income Tax Acts ". . . themselves impose a territorial limit; either that

(1) [1904] A. C. 161.
(2) (1932) 17 Tax Cas. 362
(3) [1902] A. C. 287.
(4) Ibid. 296, 297, 298.
(5) (1899) 14 App. Cas. 493, 504.

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"from which the taxable income is derived must be situate "in the United Kingdom, or the person whose income is to "be taxed must be resident there." These words of Lord Herschell were quoted and applied by Lord Wrenbury in *Whitney* v. *Inland Revenue Commissioners* (1) where the question was the chargeability to supertax of a non-resident alien, an American subject residing in the United States. He was not in England, but he drew a large income from property situated here. It was held that a non-resident alien was chargeable in respect both of income tax and of the additional duty of income tax called super-tax. So it was decided by all their Lordships. Other authorities to the same effect need not be quoted. Though the usual ground on which competency to tax is based, namely, residence, did not exist in that case, the alternative ground, namely, that the income was derived from property in the country which imposed the tax, was sufficient. These principles apply to the ordinance of 1940 which, by s. 5, expressly provides for the imposition of tax on the income of any person accruing in, or derived from or received in the colony in respect of (inter alia) dividends, interest or discounts. The authorities referred to show that there is no general rule of international comity which renders such taxation on non-residents incompetent. Equally, in their Lordships' judgment, it is not incompetent by reason of the circumstance that the colony cannot pass extra-territorial legislation. A tax in this form is not extra-territorial so long as it does not affect to tax property not situate in the colony. On the ground that this rule was infringed it was held in *London and South American Investment Trust* v. *British Tobacco Co.* (*Australia*) (2), that the legislation there in question was extra-territorial inasmuch as it sought to impose or enforce taxation on a non-resident shareholder in respect of property not situate in the colony, namely, dividends which were an English debt due in respect of shares locally situate in England. This decision was before the Statute of Westminster of 1931, the effect of which was discussed in *British Coal Corporation* v. *Regem* (3). The principle, however, still applies to a colony like Trinidad.

Section 30 of the ordinance, it was also said, if construed as the Full Court has done, might be regarded as extra-territorial in effect, but s. 30, under which the assessment is made, seeks legitimately to meet the difficulty that, as Barber is in New Jersey and not in Trinidad, the tax cannot be enforced against him since the courts of one country will not enforce the revenue laws of another. The section is in the following terms: "Any resident agent, trustee, mortgagor, or other "person who transmits rent, interest, or income "derived from any other source within the colony, to a non-"resident person shall be deemed to be the agent of such "non-resident person and shall be assessed and shall pay the "tax accordingly." There is, in their Lordships' judgment, no ground for treating this section as extra-territorial in effect or requiring it to be construed otherwise than in accordance with the ordinary meaning of the words used. It is not extra-territorial merely because its purpose is indirectly to secure payment from the non-resident alien of the tax which is validly imposed on him. The person directly affected is the statutory agent, in this case the appellant, who is within the colony. The obligation is imposed directly on him. His liability is complete when within the colony he does the act which transmits the income to the non-resident. The transmission begins in the colony, though it continues until delivery to the non-resident alien. Similarly, in *Peninsular and Oriental Steam Navigation Co.* v. *Kingston* (1), the penalty was imposed on the steamer when she came back to an Australian port with the seals on the bonded stores broken, though they had been broken outside territorial waters. The breaking of the seals and the use of the bonded stores were what it was intended to prevent or punish, but the condition of enforcing the law was the vessel's entering the territorial limits with the seals broken. So, here, the condition of the liability of the statutory agent was the transmitting of the income to the non-resident. Section 30 was accordingly not open to objection as exceeding the territorial limitations. Indeed, Mr. Tucker did not contend that the ordinance was invalid, but he sought to impose a narrow construction which he said was necessary to avoid the objection. In their Lordships' opinion, the whole objection is baseless, and the section must be construed according to its natural meaning whenever it applied. That left the substantial question whether it did apply on the facts in this case. It will now, to decide the question, be necessary to examine the facts more closely, with particular reference to the question whether the appellant transmitted the dividend to Barber in New Jersey. That is the second question of law stated for the opinion of the court, and is, in their Lordships' view, the only one now material.

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(1) [1926] A. C. 37, 55.

(2) [1927] 1 Ch. 107.

(3) [1935] A. C. 500, 516.

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(1) [1903] A. C. 471.

The dividend declared in the resolution of the appellant's board created a debt due from the appellant to Barber. It was, so far as local situation may be attributed to a debt, a debt which was locally situated in Trinidad. It was a debt due from a Trinidad company, created and payable in Trinidad. The shareholder, Barber, was, it is true, resident in New Jersey, and the debt to him might in normal course have been paid by sending a dividend warrant or similar credit instrument by mail. In this particular case the arrangement between the parties, made previously to the resolution, had the effect that, instead of this method of payment being adopted, the debt should be paid by cancellation of Barber's indebtedness to the appellant. The main contention on behalf of the appellant is that this does not involve a " transmission " of the dividend to Barber, and that the conditions of s. 30 are not fulfilled even if the word " transmission " is construed contrary to the appellant's submission, as meaning in its context a transmission beyond the borders of the colony. This is the gravamen of the argument. Certain minor aspects may be left to be discussed later. The appellant's argument does not necessarily involve denying that there was payment of the dividend, though a subsidiary argument was put forward at one stage that the settlement by way of cancelling the debt for goods supplied and setting it against the dividend was not payment but the antithesis of payment. It was, however, in their Lordships' opinion, payment.

Their Lordships at this stage accept that the word " transmit " means in the context " transmit " to a non-resident outside the limits of the colony. It is true that " transmit " is in itself not decisive on this point. A dividend may be transmitted by the warrant being sent by post or by messenger to Tobago or any other place in the colony, and it may be so transmitted to a non-resident if he happened at the moment to be temporarily in passage through the colony. That, however, would be a somewhat fanciful application of the word in this connexion. The object of s. 30 is clearly to create a statutory agent from whom the tax may be collected. He is made, as it were, vicariously liable for the tax in place of the non-resident recipient of the revenue, with a right of indemnity over against the person primarily liable for the tax.

The company is not bound to deduct the tax, though it is entitled to do so. Such a method is not unknown in modern systems of taxation and can be paralleled from other systems. Section 30 does not expressly in words qualify " transmission " as meaning " from the colony," but the normal case of transmission to a non-resident alien would be transmission out of the colony, and that case must at least be covered. Was there, then, such a transmission ? No actual money passed. If the dividend had been transmitted by a banker's draft sent by the appellant to Barber it could not have been questioned that the dividend had been transmitted, but the two companies might do their own banking transactions between themselves and dispense with the intervention of banking facilities. The transaction involved the sending to Barber by the appellant, and receipt by Barber from the appellant, of the dividend. This was effected by the agreement that payment should be made by cancellation of the debt for goods supplied. This method had been mutually agreed before the dividend was declared. The agreement was carried out by each party making corresponding entries in its books. These were not merely book-keeping entries. They represented the actual receipt of the dividend by Barber, and the actual payment of it by the appellant to Barber, and concurrently, the actual receipt by the appellant from Barber of payment of his debt for goods supplied. The composite and joint transaction in principle satisfies the description of a payment by Mellish L.J. in *In re Harmony & Montagu Tin & Copper Mining Co., Spargo's Case* (1). " Nothing " is clearer," he said, " than that if parties account with each " other, and sums are stated to be due on the one side, and " sums to an equal amount due on the other side of that " account, and those accounts are settled by both parties, it " is exactly the same thing as if the sums due on both sides " had been paid. Indeed, it is a general rule of law, that in " every case where a transaction resolves itself into paying " money by A. to B., and then handing it back again by B. to " A., if the parties meet together and agree to set one demand " against the other, they need not go through the form and " ceremony of handing the money backwards and forwards." This statement gives a description of what is often called a settlement in account or a set off, the word not being there used in the technical sense of the statutes of set off. There is

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(1) (1873) L. R. 8 Ch. 407, 414.

J. C.

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actual, not merely notional or constructive payment of the indebtedness on either side. There is thus a " transmission " of funds whether the transmission is only across the table or is across the ocean. Transmission involves, indeed, an intermediate space, but does not depend on the extent of the space. Each party receives payment from the other. Each party having received payment in this way makes in his turn the corresponding payment to the other. The transaction is necessarily bilateral. In *Spargo's Case* (1) the transaction was capable of being completed within narrow limits of space, for instance, across a table, or in a room, or by letters sent from one street to another, but the mere space involved is not material. Lord Lindley, in *Gresham Life Assurance Society* v. *Bishop* (2) made some pertinent observations on the topic. He said (3) " First, let us consider what is meant " by the receipt of a sum of money. My Lords, I agree with " the Court of Appeal that a sum of money may be received " in more ways than one, e.g., by the transfer of a coin or " a negotiable instrument or other document which represents " and produces coin, and is created as such by business men. " Even a settlement in account may be equivalent to a receipt " of a sum of money, although no money may pass ; and I am " not myself prepared to say that what amongst business " men is equivalent to a receipt of a sum of money is not " a receipt within the meaning of the statute which your " Lordships have to interpret. But to constitute a receipt " of anything there must be a person to receive and a person " from whom he receives, and something received by the " former from the latter, and in this case that something " must be a sum of money. A mere entry in an account which " does not represent such a transaction does not prove any " receipt, whatever else it may be worth." In the present case, no one could say that the entries in the books of the two companies did not represent a genuine transaction and a receipt of money in the form in which money is transmitted and received as between business men. Since 1902, the transmission of funds has become still more divorced in the minds of business men, and even of lawyers, from the idea of any material embodiment. No document is necessary. Two companies separated by the ocean may orally agree over the wireless telephone that the debt of one may be set against a debt

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(1) [1873] L. R. 8 Ch. 407, 414.

(2) [1902] A. C. 287.

(3) Ibid. 296.

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of the other and both cancelled. The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement, but what has happened is, if so intended, equivalent to a receipt of money, in Lord Lindley's words, and a receipt of anything by a person who is at a distance from the sender involves a transmission. Hence, in their Lordships' opinion, the transaction in the present case involved a transmission of "revenue" within the meaning of s. 30 from the appellant to Barber, with the consequence that the appellant became liable as statutory agent for the amount of the tax.

Lord Lindley goes on a little later to develop the same point. It may be noted that he was dealing with a somewhat different subject-matter, namely, the liability of a resident taxpayer in respect of foreign revenue. That liability is in England limited to revenue "received in the United Kingdom." In the *Gresham* case (1) the revenue was received by the company's office abroad and was employed abroad and no part was remitted to this country. It was held that there was in that case no receipt in the United Kingdom. Lord Lindley, however, distinguishing the case before him, referred with approval to *Scottish Mortgage & Land Investment Co. of New Mexico* v. *Inland Revenue Commissioners* (2) in which it had been held that there had been a receipt in the United Kingdom from the office abroad, and thus described the position in the latter case (3) "Money received by the company's agents "abroad was clearly and unmistakably treated by the company "as remitted to and received by it here, and money here was "treated by the company as remitted abroad in exchange for "it. The exchange was effected by a book entry; but that "entry was the business mode of carrying out cross-remittances "which it would have been unbusinesslike and really childish "to have effected in any other way." Though the application of the principle was different in certain ways from that in question here the difference was not pertinent to the crucial matter of principle now to be decided, namely, whether the mode of operation adopted was a transmission of revenue by the appellant to Barber. Lord Lindley referred to other decisions to the like effect, and others have been cited to their Lordships.

Their Lordships accordingly agree with the courts below in

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(1) [1902] A. C. 287.

(2) (1886) 14 Rettie 98.

(3) [1902] A. C. 298.

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holding that the dividend was transmitted by the appellant to Barber, and that s. 30 applies. The same result would hold if s. 30 were construed as applicable to transmissions within the colonies, as it might well be so far as the actual words go, and the same would be true if the settlement in account were treated as taking place within the colony, as involving the cancellation of a debt, namely, the dividend, locally situate in the colony, in return for the cancellation of another debt also so situate, namely, the debt for goods supplied. The difficulty which their Lordships feel about applying this view to the facts is that Barber, a necessary party to the transaction, was outside the colony. They, however, construe s. 30 as at least including transmission outside the colony.

Section 30 was treated throughout the proceedings below as a self-contained section, defining the complete scope of its own operation. Before this Board, however, the appellant sought to raise the further points that s. 30 only authorized an assessment on a person who can be deemed to be an agent within the meaning of s. 26, sub-s. 1, and only if an assessment on that footing is otherwise competent. It was further contended that s. 30 must also be read as qualified by s. 26, sub-s. 4, which prohibits the making of an assessment on any person who is not an authorized person carrying on the regular agency of a non-resident person. Their Lordships find themselves unable in this appeal to deal with these contentions. They raise important questions of law on the construction of the ordinance which their Lordships feel they could not properly decide without the benefit of the opinion of the colonial judges who have not been asked to pass upon them. In addition, the contentions seemed likely to involve questions of fact on which evidence might have been, but had not been, given. Their Lordships, therefore, do not express any opinion on these topics. It was also suggested that s. 30 required for its operation three parties, the debtor, the creditor and an intermediary agent, separate from either, to transmit. Their Lordships see no ground for this embroidery of the simple and appropriate language of the section. A debtor may be treated as assuming, in addition, the functions of a statutory agent to transmit the money to the creditor. This, for instance, would obviously be true of a mortgagor, a class specifically mentioned in s. 30. The general words " income derived from any other " source " are clearly sufficient to include dividends, which

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are particularly mentioned in s. 5 (*d*), though not in s. 30 in express terms.

Their Lordships are of opinion that the appeal fails on all points and should be dismissed, and that the order appealed from should be affirmed. The appellant will pay the costs of the appeal. They will humbly so advise His Majesty.

Solicitors for appellant: *Lawrance, Messer & Co.*
Solicitors for respondents: *Burchells.*

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Nov. 6.

KING-EMPEROR . . . . . APPELLANT;

AND

BENOARI LAL SARMA AND OTHERS . . RESPONDENTS.

ON APPEAL FROM THE FEDERAL COURT OF INDIA.

India—Emergency legislation—Special criminal courts—Constitutional validity—Intra vires the Governor-General—Government of India Act, 1935 (25 & 26 *Geo.* 5, *c.* 42) (*read with the India and Burma (Emergency Provisions) Act*, 1940 (3 & 4 *Geo.* 6, *c.* 33, *s.* 1, *sub-s.* 3)), *s.* 72 of *sched. IX.—Special Criminal Courts Ordinance, No. II. of* 1942 (*as amended by Ordinances Nos. XXIV., XLII. and LXI. of* 1942).

Ordinance No. II. of 1942, which was made and promulgated by the Governor-General under s. 72 of sched. IX. of the Government of India Act, 1935, read with the India and Burma (Emergency Provisions) Act, 1940, and which recited in the preamble that "an emergency has arisen which makes it necessary to provide "for the setting up of special criminal courts," and in the body of the ordinance made provision for the setting up of such courts when necessary, with special judges and special magistrates, and for the respective limits of jurisdiction and procedure, together with restrictions on appeal, was intra vires the Governor-General.

Whether an emergency existed at the time the ordinance was made and promulgated was a matter of which the Governor-General was the sole judge. His view that there was an emergency justified and authorized the ordinance providing in advance for special courts, and it was not invalid by reason of the provision in s. 1, sub-s. 3, that "it shall come into force in any Province only if "the Provincial Government, being satisfied of the existence of an

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* *Present:* VISCOUNT SIMON L.C., LORD ROCHE, LORD PORTER, LORD GODDARD and SIR MADHAVAN NAIR.

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"emergency . . . . declares it to be in force in the province." Further, the provisions of that sub-section did not amount to a delegation of legislative power, but merely provided for the necessity of the local application of the ordinance being determined by the local administrative body.

Bhagat Singh v. *The King-Emperor* (1931) L. R. 58 I. A. 169; *Shreekant Pandurang* v. *Emperor* I. L. R. [1943] B. 331, at 351; and *Russell* v. *The Queen* (1882) 7 App. Cas. 829, at 835, referred to.

Section 26 of the ordinance, which was framed to exclude the revisional and appellate powers of the High Court in cases dealt with by the special courts, was valid, since, assuming an emergency, the Governor-General acting under s. 72 of the Government of India Act might repeal or alter the ordinary law as to the revisionary jurisdiction of the High Court just as the Indian legislature itself might do.

Lastly, the ordinance was not invalidated by reason of the provisions of ss. 5, 10, 14 and 16, which left it to the Local Government, or to some officer of the Local Government empowered by it in that behalf, to direct what offences or classes of offences and what cases or classes of cases should be tried by the special courts. The law making authority in India, whether the legislature or the Governor-General acting under his emergency powers, can validly enact that the choice of courts shall rest with an executive authority as an exercise of the discretion conferred on the authority to make laws for the peace, order and good government of India, and there is no constitutional limitation debarring the executive authority, when specially authorized by the ordinance, from giving directions as to the court which is to try an accused.

Judgment of the Federal Court of India [1943] Fed. L. J. 79, set aside, and Ordinance No. II. of 1942 declared intra vires.

Appeal (No. 1 of 1944), by leave of the Federal Court of India, from a judgment of that court (June 4, 1943), which affirmed by a majority a judgment and order of the High Court at Calcutta (April 21, 1943), passed in the exercise of its criminal revisional jurisdiction. By their judgment the High Court, on the sole ground that certain provisions contained in the Special Criminal Courts Ordinance, No. II., of 1942, were ultra vires the Governor-General of India, set aside the convictions of the fifteen respondents to this appeal, all police constables, by the special magistrate at Jessore (being a special court constituted under the ordinance) on charges of, inter alia, rioting, assault on a police officer and committing prejudicial acts tending to cause disaffection in the police force. A sentence of two years' rigorous imprisonment was imposed on each of them. The High Court ordered the respondents to be released and re-arrested and tried in the ordinary courts according to ordinary process of law.

The question for determination in this appeal was whether or not the Governor-General was empowered by s. 72 of the Government of India Act, 1935, as set out in sched. IX. thereof, read with the India and Burma (Emergency Provisions) Act, 1940, to enact Ordinance No. II. of 1942.

By s. 72 of the Government of India Act, 1935, read with the India and Burma (Emergency Provisions) Act, 1940: "The "Governor-General may, in cases of emergency, make and "promulgate ordinances for the peace and good government "of British India or any part thereof, and any ordinance so "made shall have the like force of law as an Act passed by the "Indian legislature; but the power of making ordinances under "this section is subject to the like restrictions as the power of "the Indian legislature to make laws; and any ordinance "made under this section is subject to the like disallowance as "an Act passed by the Indian legislature, and may be controlled "or superseded by any such Act."

By the Special Criminal Courts Ordinance, No. II. of 1942: "s. 1, sub-s. 3:—It shall come into force in any Province "only if the Provincial Government, being satisfied of the "existence of an emergency arising from any disorder within "the Province or from a hostile attack on India or on a country "neighbouring on India or from the imminence of such an "attack, by notification in the official Gazette, declares it to "be in force in the Province, and shall cease to be in force "when such notification is rescinded."

"5. A Special Judge shall try such offences or classes of "offences, or such cases or classes of cases as the Provincial "Government, or a servant of the Crown empowered by the "Provincial Government in this behalf, may, by general or "special order in writing, direct . . . ."

"10. A Special Magistrate shall try such offences or classes "of offences, or such cases or classes of cases other than "offences or cases involving offences punishable under the "Indian Penal Code with death, as the Provincial Government, "or a servant of the Crown empowered by the Provincial "Government in this behalf, may, by general or special order "in writing, direct . . . ."

"14. If any question arises whether, under any order made "under s. 5 or s. 10, an offence is triable by a Special Judge or "a Special Magistrate, the question shall be referred for "decision to the authority which made the order and the "decision of that authority shall be final."

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" 16.—(1.) A Summary Court shall have power to try such " offences or classes of offences, or such cases or classes of cases " as the District Magistrate, or in a Presidency-town the Chief " Presidency Magistrate, or a servant of the Crown authorized " in this behalf by the District Magistrate or Chief Presidency " Magistrate, may by general or special order direct :

" Provided that no person shall be tried by a Summary Court " for an offence which is punishable with imprisonment for a " term exceeding two years, unless it is an offence specified in " sub-s. 1 of s. 260 of the Code.

" (2.) The District Magistrate or Chief Presidency Magistrate " may by general or special order give directions as to the " distribution among the Summary Courts within his jurisdiction of cases triable by them under sub-s. 1."

" 26. Notwithstanding the provisions of the Code, or of any " other law for the time being in force, or of anything having " the force of law by whatsoever authority made or done, there " shall, save as provided in this Ordinance, be no appeal from " any order or sentence of a Court constituted under this " Ordinance and, save as aforesaid, no Court shall have " authority to revise such order or sentence, or to transfer any " case from any such Court, or to make any order under s. 491 " of the Code or have any jurisdiction of any kind in respect " of any proceedings of any such Court."

The High Court at Calcutta (Derbyshire C.J., Khundkar and Sen JJ.) held that the ordinance was ultra vires the Governor-General, and, on appeal, the Federal Court (Varadachariar C.J., and Zafrulla Khan J., Rowland J. dissenting) affirmed their decision.

1944. July 5, 6, 10, 13 and 14. *Macaskie K.C.*, *Sir Walter Monckton K.C.*, *Sir Thomas Strangman K.C.*, *Wallach* and *Handoo* for the Crown. Ordinance No. II. of 1942 is intra vires because all that has been done by the legislative authority, i.e., the Governor-General, has been to leave it to the Provincial Government to say when the ordinance shall be brought into force, and to appoint special judges to sit in the special courts, and to direct by its general or special order in writing what class or classes of cases and offences shall be tried by those courts. It is conditional legislation. The machinery is there, it is set working by the Provincial Government. The ordinance does not create a single new offence. The legislative power in time of emergency is very wide, and the Governor-General, when he

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is legislating within the power conferred on him by the Act, is in no way to be differentiated from the Indian legislature which, within the ambit of its legislative powers, is supreme, and can delegate in many respects the operation of a statute which it passes. Under s. 102 of the Government of India Act, when there has been a general proclamation of emergency, as there was in India in 1939, the power of the Indian legislature, and hence of the Governor-General, extends to matters in the Provincial List. It is essential to good legislation that a good deal of discretion should be left to subsidiary or subordinate authorities, and if the Central legislature is entitled to do that, so also is the Govenor-General. He was entitled to leave it to the discretion of the Provincial Government, as the emergency loomed larger and larger, to decide that the ordinance was to apply. Objection was taken below to ss. 5, 10 and 16 of the Ordinance on the ground that there was an invalid delegation of legislative power to the Provincial Government or its executive officer, and it was said that that was ultra vires the Governor-General and that it was he alone who should have directed by general or special order.

It is conceded that by the ordinance the respondents were deprived of certain rights—trial by jury, revision and appeal—and the Criminal Procedure Code is thereby modified or repealed. The ordinance quite plainly, within limits, does oust the jurisdiction of the High Court in criminal matters. It was not necessary for the Governor-General to set up the special courts immediately; he could leave it to the discretion of the Provincial Government, depending on how the phases of the emergency struck the Province, to bring it into effect. The ordinance merely did what was authorized to be done by *The Queen* v. *Burah* (1) and many others. What was done by the subordinate authority was done under and by virtue of the Act.

[He was stopped.]

The respondents did not appear.

Comyns Carr K.C., *J. M. Parikh* and *Ralph Parikh* appeared for the respondents as amici curiæ, having been granted special leave to appeal in another matter which raised the same point. Section 313, sub-s. 3, of the Government of India Act says that the "Governor-General" means the "Governor-

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(1) (1878) 3 App. Cas. 889.

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"General in Council" except in cases with respect to which the Governor-General is required by the provisions to act in his discretion. Therefore, wherever a section does not say that, it means "Governor-General in Council" although it says "Governor-General." Accordingly, the present ordinance, if it could be validly made at all, must be made by the Governor-General in Council and not by the Governor-General personally. It does not purport to be made by the former. There is no room for reading "in his discretion" into a section if it is not there. The proclamation under s. 102 has only one effect—to bring s. 102 into operation and enable the Indian legislature to deal with matters in the Provincial List. Reliance is placed on the reasoning of Sen J. in the High Court. It is true that this Board decided in *Bhagat Singh* v. *The King-Emperor* (1) that you cannot go behind the statement of the Governor-General that in his opinion an emergency has arisen, but that must always be subject to the proviso that he must appear to be using the word emergency in its proper meaning. If it appears from the terms of his ordinance that he is not doing so, then it is legitimate to say that he did not think that there was an emergency in the true sense of the word. While it may be quite legitimate to pass an ordinance which is conditional in its operation, on the other hand it is, according to *Burah's* case (2) illegitimate to delegate the legislative power itself. What is complained of here, however, is not that the Governor-General has delegated either legislative power or executive power, but that he has delegated the power to determine the very thing which is the condition precedent to his legislating at all, namely, whether an emergency has arisen. The definition of emergency in *Bhagat Singh's* case (1) does not purport to be exhaustive, but it does say that it connotes a state of matters calling for drastic action, and that it demands immediate action. Emergency does not mean emergency at large. Under s. 72 of the Government of India Act the emergency with which the Governor-General is dealing should be an existing emergency and should call for the particular kind of immediate action which he proposes to take. If the particular kind of emergency, which in the Governor-General's opinion justifies a particular kind of action, is in itself wholly in prospect and not present, then although there may be present an emergency of some other kind, that would not justify, under s. 72, the ordinance being made. The existence of the emergency requiring immediate

(1) (1931) L. R. 58 I. A. 169.   (2) 3 App. Cas. 889.

action is, under that section, the basis of the legislative power. His powers are subject to a condition precedent which must be fulfilled by himself alone. The powers left under ss. 5, 10 and 16 of the ordinance to the Provincial Government go beyond the kind of limits laid down or suggested in *Burah's* case (1), and really amount to entrusting the persons named in those sections with legislative power. At the moment the special courts are set up, there being the ordinary courts side by side with them, no man can say before which court any particular case or class of cases will come. What is done here is that over the whole field of criminal jurisdiction the matter is left absolutely to the untrammelled discretion of a particular official.

Nov. 6. The judgment of their Lordships was delivered by VISCOUNT SIMON L.C. This is an appeal by the Government of India from a judgment of the Federal Court, dated January 4, 1943, dismissing an appeal from a judgment of the High Court at Calcutta, setting aside a conviction of fifteen individuals by a Special Magistrate purporting to act under Ordinance No. II. of 1942, promulgated by the Governor-General on January 2, 1942. The ground on which the conviction was set aside was that the ordinance was ultra vires. The question is largely academic, for on Ordinance No. II. being declared by the Federal Court to be ultra vires, Ordinance XIX. of 1943 was promulgated to replace it. But in view of the elaborate argument that has taken place and the way in which the topic has been dealt with in the judgments in India, their Lordships think that the better course is to decide the question whether Ordinance II. is invalid, especially as this may be of assistance in deciding other questions which may arise hereafter as to the validity of ordinances made, in cases of emergency, by the Governor-General under the authority of s. 317 and s. 72 of sched. IX. of the Government of India Act, 1935.

Their Lordships must, however, make a preliminary observation on the way in which the issue of the validity of the ordinance has been dealt with by the Indian courts. The appeal from the Special Magistrate who convicted the accused was brought to the High Court under its criminal revisional jurisdiction by a petition for revision under ss. 435 and 439 of the Code of Criminal Procedure. This assumes that the court below was a valid inferior court whose decision calls,

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(1) 3 App. Cas. 889.

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in the view of the appellants who were convicted and sentenced by it, for revision. But if the Special Magistrate who tried the case was a valid court, duly authorized by the ordinance, then by the very terms of the ordinance there is no appeal to the High Court. Sen J., at the beginning of his judgment in the High Court, points this out very clearly. If, on the other hand, the ordinance had no validity, the Special Magistrate was in the same position as a private person who took on himself to conduct a trial of the appellants and to sentence them to imprisonment without any authority at all. In this latter alternative, the remedy of release by process in the nature of habeas corpus (s. 491 of the Criminal Procedure Code) would be the appropriate remedy. Their Lordships content themselves with pointing this out, without seeking to dispose of the litigation on this ground, as in their opinion the matter can be satisfactorily dealt with by considering whether the objections taken to the ordinance have any validity.

The Governor-General purported to make and promulgate the ordinance under a power conferred on him by s. 72 of sched. IX. to the Government of India Act, 1935, which must, of course, be read in the light of the India and Burma (Emergency Provisions) Act, 1940 (whereunder the operation of the words " for the space of not more than six months from its promul- " gation " was suspended during the period therein specified). [His Lordship read the section and continued :] It is to be observed that the section does not require the Governor-General to state that there is an emergency, or what the emergency is, either in the text of the ordinance or at all, and assuming that he acts bona fide and in accordance with his statutory powers, it cannot rest with the courts to challenge his view that the emergency exists. In the present instance such questions are immaterial, for at the date of the ordinance (January 2, 1942) no one could suggest that the situation in India did not constitute an emergency of the most anxious kind. Japan had declared war on the previous December 7 : Rangoon had been bombed by the enemy on December 23, and again on December 25 : earlier ordinances had recited that an emergency had arisen which required special provision being made to maintain essential services, to increase certain penalties, to deal with looting of property left unprotected by evacuation of premises, and so forth. Their Lordships entirely agree with Rowland J.'s view that such circumstances might, if necessary, properly be considered in determining whether an emergency had arisen ; but, as that learned judge goes on to point out, and, as had already been emphasized in the High Court, the question whether an emergency existed at the time when an ordinance is made and promulgated is a matter of which the Governor-General is the sole judge. This proposition was laid down by the Board in *Bhagat Singh* v. *The King-Emperor* (1), and is plainly right. On September 3, 1939, the date on which war was proclaimed between His Majesty and Germany, the Governor-General, acting under s. 102 of the Government of India Act, 1935, had proclaimed that " a grave " emergency exists whereby the security of India is threatened " by war," and thereupon the Indian legislature acquired power to make laws for a Province with respect to any of the matters enumerated in the " Provincial Legislative List," with the result that the Governor-General, acting under s. 72 of sched. IX., had, in case of emergency, the same width of legislative power.

Two objections, however, were raised to the validity of the ordinance in connexion with the question of " emergency." The ordinance recited that " an emergency has arisen which " makes it necessary to provide for the setting up of special " criminal courts," and the body of the ordinance contained the necessary framework for courts of criminal jurisdiction consisting of Special Judges, Special Magistrates, and Summary Courts, the provisions as to their respective limits of jurisdiction and procedure, together with restrictions on appeal (which fall to be separately considered in this judgment), but the ordinance did not itself set up any of these courts, but provided by s. 1, sub-s. 3, that the ordinance " shall come into force in " any Province only if the Provincial Government, being satisfied of the existence of an emergency arising from any " disorder within the Province or from a hostile attack on India " or on a country neighbouring on India or from the imminence " of such an attack, by notification in the official Gazette, " declares it to be in force in the Province, and shall cease to " be in force when such notification is rescinded." In view of this last provision, it was contended that the ordinance was invalid either because the language of the section showed that the Governor-General, notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or else because the section amounted to what was called " delegated legislation," by which

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(1) L. R. 58 I. A. 169.

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the Governor-General without legal authority sought to pass the decision whether an emergency existed to the Provincial Government instead of deciding it for himself.

There is, in their Lordships' opinion, no valid ground for either of these contentions. As regards the first one, it is enough to say that an emergency may well exist which " makes " it necessary to provide for the setting up of special criminal " courts " without requiring such courts to be actually set up forthwith all over India. Any other view would appear to deny to the Governor-General the possibility, when faced with an emergency, of making provisions which could be instantly applied if the danger increased and became even more critical to the part of India where it was necessary to apply them. It would in fact (as Beaumont C.J. observed in reference to a similar objection in the Bombay High Court in *Shreekant Pandurang* v. *Emperor* (1)) deny to the Governor-General, when faced with an emergency, the exercise of any foresight in the protection of the State. He may well have considered that, in view of the existing emergency, it was necessary to have a scheme for special courts drawn up and all ready for application if the existing emergency were further aggravated. A very similar situation arose in this country when, under the Emergency Powers Act, the Government devised and prepared for instant application a system of zone courts which were to be put into force only if, owing to invasion by the enemy or the like, the ordinary courts in some part of the country were judged unable to function satisfactorily. Sen J. in the High Court expressed the opinion that " the provisions of this " ordinance proclaim unmistakably that the Governor-General " did not think that an emergency which necessitates the " ordinance actually existed. He may have thought that such " an emergency may arise at some future time. That, however, " is not enough. The Governor-General had no power to " promulgate this ordinance unless he was of opinion that the " emergency requiring it actually existed; it is therefore " ultra vires of the Governor-General." With all respect to the learned judge, their Lordships are quite unable to accept this reasoning. It is perfectly possible, and, indeed, it is quite obvious, that the Governor-General regarded the situation on January 2, 1942, as constituting an emergency—in view of what was happening it would be remarkable if he did not—and this justified and authorized the ordinance providing in advance for special courts. It does not in the least follow that the bringing of special courts into actual existence and operation all over India must take place at the same time.

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(1) I. L. R. [1943] B. 331, 351.

The second objection has attracted more support, but is, in their Lordships' opinion, equally unfounded. It is undoubtedly true that the Governor-General, acting under s. 72 of sched IX., must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities. But the Governor-General has not delegated his legislative powers at all. His powers in this respect, in cases of emergency, are as wide as the powers of the Indian legislature which, as already pointed out, in view of the proclamation under s. 102, had power to make laws for a Province even in respect of matters which would otherwise be reserved to the Provincial legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's ordinance taking the form that the actual setting up of a special court under the terms of the ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This is not delegated legislation at all. It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity. Their Lordships are in entire agreement with the views of the Chief Justice of Bengal and of Kkundkar J. on this part of the case. The latter judge appositely quotes a passage from the judgment of the Privy Council in the well-known decision in *Russell* v. *The Queen* (1). In that case the Canadian Temperance Act, 1878, was challenged on the ground that it was ultra vires the Parliament of Canada. The Temperance Act was to be brought into force in any county or city, if on a vote of a majority of the electors of that county or city favouring such course, the Governor-General by Order in Council declared the relative part of the Act to be in force. It was held by the Privy Council that this provision did not amount to a delegation of legislative power to a majority of the voters in a city or county. Their Lordships said " The short answer to " this objection is that the Act does not delegate any legislative " powers whatever. It contains within itself the whole legisla- " tion on the matters with which it deals. The provision that " certain parts of the Act shall come into operation only on the

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(1) (1882) 7 App. Cas. 829.

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" petition of a majority of electors does not confer on these " persons power to legislate. Parliament itself enacts the " condition and everything which is to follow upon the condition " being fulfilled. Conditional legislation of this kind is in many " cases convenient, and is certainly not unusual, and the power " so to legislate cannot be denied to the Parliament of Canada " when the subject of legislation is within its competency " . . . . If authority on the point were necessary, it will be " found in the case of *Queen* v. *Burah* (1), lately before this " Board " (2).

The next objection to be considered is that s. 26 of the ordinance, which is framed to exclude the revisional and appellate powers of the High Court in cases dealt with by the special courts constituted under the ordinance, was ineffective and ultra vires as being in conflict with s. 223 of the Government of India Act, 1935, which provides :—" Subject to the " provisions of this Part of this Act, to the provisions of any " Order in Council made under this or any other Act and to the " provisions of any Act of the appropriate Legislature enacted " by virtue of powers conferred on that Legislature by this Act, " the jurisdiction of, and the law administered in, any existing " High Court, ... shall be the same as immediately before " the commencement of Part III. of this Act." Previous to 1935 the High Court had revisional jurisdiction over the magistrates' courts in the relevant area. The argument advanced was that this jurisdiction could not be taken away by an ordinance made by the Governor-General under s. 72, as the Governor-General's ordinance was not an " Act of the " appropriate legislature." " Legislature," it was said, means only the Central legislature consisting of the two Houses and the Governor-General, or the Provincial legislature consisting of the two Houses and the Governor, and the Governor-General when making an ordinance in cases of emergency under s. 72 was not either of these legislatures. The argument, as Sir Harold Derbyshire pointed out in his judgment, overlooked the provision in s. 311, sub-s. 6, of the Act, which says :— " Any reference in this Act to . . . . Acts or laws of the Federal " or a Provincial Legislature, shall be construed as including " a reference to an Ordinance made by the Governor-" General . . . ." There is, thus, no substance in this objection. Assuming that the condition as to emergency is fulfilled, the Governor-General acting under s. 72 may repeal or alter the ordinary law as to the revisional jurisdiction of the High Court, just as the Indian legislature itself might do.

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(1) 3 App. Cas. 889.

(2) 7 App. Cas. 835.

There remains to be considered another objection to the validity of the ordinance which is, as their Lordships understand, the main ground on which it has been held to be ultra vires. The objection may, perhaps, be stated in more ways than one, but the substance of it, as appears both from the judgment of Sir Harold Derbyshire in the High Court and of the Chief Justice in the Federal Court, is that the ordinance makes it possible to discriminate between one accused and another, or between one class of offence and another, so that cases may be tried either in the special courts or under the ordinary and well-established criminal procedure according to the direction and decision of provincial authorities. It is evident that this is an aspect of the matter which has greatly troubled the majority of the judges in India who have had this case before them, and in view of the well-established practice in India by which decisions in criminal cases are open to review by a higher court, it is natural that those who are versed in applying this system should feel disturbed by the totally different arrangement contained in the ordinance.

The sections of the ordinance which appear to have given the judges in India most concern are ss. 5, 10, 14 and 16. [His Lordship read the sections and continued :] Sir Harold Derbyshire found that these sections were invalid. He pointed out, with justice, that the ordinance left it to the local Government, or to some officer of the local Government empowered by it in that behalf, to direct what offences or classes of offences, and, moreover, what cases or classes of cases, should be tried by the special courts. He thought that this amounted to repealing the Code of Criminal Procedure in part, for under the ordinance there would be no trial by jury and no right of appeal and no right of revision by superior courts, including the High Courts, such as are enacted by the Code. " In effect," he said, " it is the Provincial Government or the District Magistrate, " acting not in a judicial capacity but in an administrative " capacity, that deprives the subject of his right under the " Code and repeals its valid provisions as far as he is concerned. " That, in my view, is repealing the Code of Criminal Procedure " in part—in that instance legislation ad hoc for the man's " case." He added that he did not find authority in s. 72 to justify this result ; and in his view the above-quoted sections, which he declared invalid, purported to authorize persons

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other than the duly authorized legislature constituted under the Government of India Act, 1935, to repeal ad hoc certain provisions of the Criminal Procedure Code and of the Letters Patent of the High Court. Khundkar J. agreed with the Chief Justice on this point, and stated his objection to the above-quoted sections of the ordinance thus :—" The result is that " no man accused of an offence may know whether he is to " be tried by a court under the Code, subject to all the safe-" guards provided by the Code, including a right of appeal or " revision under the Code, or to be tried on the mere motion of " the Provincial Government or of an officer of the Crown " empowered by the Provincial Government, by some one or " other of the special courts under the ordinance. The " Provincial Government or an officer of the Crown empowered " by the Provincial Government is endowed with a power that " is far-reaching, unfettered by rule, unconditional and subject " to no supervision by the High Court or by any court under " the Code. It is a power to direct any person accused of any " criminal offence to be tried by one or other of the courts " constituted under the ordinance." The learned judge goes on to point out what he regards as " the possible mischief " which may flow from the unwise or injudicious exercise of " such a power," fortifying his criticism by quotations from well-known writers on jurisprudence such as Anson and Salmond, and he concludes that the above-quoted sections are ultra vires on the ground that the ordinance gives to the Provincial Governments a " power to effectuate jurisdiction of " special criminal courts by making orders in individual cases " or groups of cases." Sen J., as their Lordships understand, did not differ from the Chief Justice and Khundkar J. in this view, though he rested his decision that the ordinance was ultra vires on other grounds which their Lordships have already indicated.

In the Federal Court the Chief Justice dwelt on the value of the revisional jurisdiction, but considered that the most serious defect in the impugned ordinance was the power it conferred to discriminate between one accused and another by directing trial in different courts. He developed his objections on this point by elaborate references to the constitutional principles involved in certain decisions of the Supreme Court of the United States and of the High Court of Australia, and quoted passages from the writings of Sir Courtenay Ilbert and of Sir Cecil Carr to illustrate the relation between executive and legislative powers in the British Constitution. He concluded that ss. 5, 10 and 16 of the ordinance are "open to objection as having left the "exercise of the power thereby conferred on executive officers "to their absolute and unrestricted discretion, without any "legislative provision or direction laying down the policy or "conditions with reference to which that power is to be "exercised." This was the ground on which the Chief Justice and Zafrulla Khan J. based their decision that the appeal of the Crown should be dismissed.

With the greatest respect to these eminent judges, their Lordships feel bound to point out that the question whether the ordinance is intra vires or ultra vires does not depend on considerations of jurisprudence or of policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the ordinance by which he is purporting to exercise that authority. It may be that as a matter of wise and well-framed legislation it is better, if circumstances permit, to frame a statute in such a way that the offender may know in advance before what court he will be brought if he is charged with a given crime; but that is a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian constitution to render invalid a statute, whether passed by the Central legislature or under the Governor-General's emergency powers, which does not accord with this principle. Rowland J., at the beginning of his dissenting judgment, collects a number of striking quotations from previous judgments delivered in the Privy Council as to the proper rule of construction. Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used. The learned judges who were in the majority in the Federal Court would presumably not contest this proposition, and their Lordships rather understand their view to be based on the conception that there is something underlying the written constitution of India which debars the executive authority, though specially authorized by the statute or ordinance to do so, from giving directions after the accused has been arrested and charged with crime as to the choice of court which is to try him. Their Lordships are unable to find that any such constitutional limitation is imposed. Indeed, Rowland J. points out that if it were held that where two sets

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of courts exist side by side power cannot be delegated to pass an order directing that a case shall come before the special court and not before the court under the Code, this would throw doubt on a long course of legislation in India where this very thing is enacted. The learned judge cites thirteen instances, and, in addition to these, refers to the discretion conferred by the Indian Army Act and by the Indian Air Force Act on the prescribed authority to decide in a particular case, where a criminal court and a court martial would both have jurisdiction, before which court the accused shall be brought for trial. There is not, of course, the slightest doubt that the Parliament of Westminster could validly enact that the choice of courts should rest with an executive authority, and their Lordships are unable to discover any valid reason why the same discretion should not be conferred in India by the law-making authority, whether that authority is the legislature or the Governor-General, as an exercise of the discretion conferred on the authority to make laws for the peace, order, and good government of India.

Their Lordships will humbly advise His Majesty that the appeal should be allowed. The judgment of the Federal Court must be set aside and the Ordinance II. of 1942 declared not to be ultra vires.

Solicitor for appellant: *Solicitor, India Office.*
Solicitors for amici curiæ: *Lambert & White.*

J. C.*

1944

Nov. 27.

[PRIVY COUNCIL.]

SELLASAMY . . . . APPELLANT;

AND

KALIAMMA AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Administration—Distribution—Gift to child—" On the occasion " of " marriage—Subject to collation—Onus of proof of release—Matrimonial Rights and Inheritance Ordinance, Revised Leg. Enactments, 1938, *c.* 47, *s.* 35.

By s. 35 of the Matrimonial Rights and Inheritance Ordinance, c. 47, of the Revised Legislative Enactments issued in 1938: " Children " or grandchildren by representation becoming with their brothers

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* *Present:* LORD THANKERTON, LORD WRIGHT and SIR JOHN BEAUMONT.

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" and sisters heirs to the deceased parents are bound to bring into " hotchpot or collation all that they have received from their " deceased parents above the others, either on the occasion of " their marriage or to advance or establish them in life, unless it " can be proved that the deceased parents, either expressly or " impliedly, released any property so given from collation."

In construing the above section the relevant consideration is what, at the time of the gift, was the donor's intention, and, if a marriage, or a contemplated marriage, was a factor inducing the gift, then the gift was made " on the occasion of " the marriage within the meaning of the section, and it is irrevelant that a marriage, in fact, never took place. The onus of proving that the gift was " either expressly or impliedly released . . . . from " collation " is on the donee.

Decree of the Supreme Court of Ceylon affirmed.

APPEAL (No. 13 of 1943) from a judgment and decree of the Supreme Court of the Island of Ceylon (June 17, 1941) which affirmed an order of the District Court of Kandy (February 3, 1941) in proceedings for the administration of the estate of one Ponniah, who died in 1936.

The following facts are taken from the judgment of the Judicial Committee. The appellant was the eldest son of Ponniah by his first marriage, and the respondents were children by a subsequent marriage. After the death of Ponniah, his widow applied for letters of administration to his estate, which were granted on June 28, 1937, various matters, which were in dispute between the parties, being referred to a judicial settlement. The appellant was born in 1896 and in 1926 his father was anxious that he should marry a cousin, by name Ponnamma. On September 7, 1927, the appellant gave to the registrar of marriages of the division of Matale South, in the district of Matale, written notice that a marriage was intended to be held within three calendar months from the date thereof between himself and Ponnamma, who was described in the notice. The deed of gift, which occasioned the dispute in the present case, was made on November 1, 1927, that was, during the currency of that notice. It was executed by the deceased, Ponniah, and the appellant, and it stated that, in consideration of the natural offspring love that the deceased had towards the appellant and in expectation of all necessary aid and assistance from him during the deceased's lifetime and divers other good causes, the deceased gave unto the appellant as an absolute gift, irrevocable on any account, the immovable property therein described, of the value of Rs. 6,000, subject to the donor's life interest, and the appellant accepted the gift. The contemplated marriage did not in fact take place, and, although the donor lived until 1936, he took no step to recall the gift.

The only dispute which was relevant to this appeal and which turned on the construction of s. 35 of the Matrimonial Rights and Inheritance Ordinance, 1938 (1), was whether the appellant was bound to bring into hotchpot in the distribution of the estate the gift made to him by his father on November 1, 1927. The District Court of Kandy and, on appeal, the Supreme Court (Howard C.J. and Soertsz J.) held that the appellant was so bound.

1944. Nov. 7. *Macaskie K.C.* and *Stephen Chapman* for the appellant.

Sir Thomas Strangman K.C. and *Bagram* for the respondents.

Nov. 27. The judgment of their Lordships was delivered by SIR JOHN BEAUMONT, who stated the facts and continued: The question whether this gift is liable to be brought into hotchpot by the appellant in the distribution of his father's estate depends on the construction of s. 39 of Ordinance 15 of 1876 (subsequently replaced by s. 35 of c. 47 in the revised legislative enactments, issued in 1938). Although the deed of gift does not mention the contemplated marriage, the lower courts were clearly right in admitting evidence as to the circumstances in which the deed was executed and the state of the donor's knowledge at that date. The principal argument for the appellant before their Lordships has been that a gift cannot be said to have been made on the occasion of a marriage if in fact no marriage takes place. If the expression "on the "occasion of their marriage" be held to mean "on the "happening of the marriage," the occasion of the marriage and the occasion of the gift being the same, such a construction would rule out the normal case of a gift by a parent to a child made shortly before or after the child's marriage designed to

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(1) By s. 35 of the Matrimonial Rights and Inheritance Ordinance, c. 47, of the revised legislative enactments, 1938: "Children or "grandchildren by representation "becoming with their brothers "and sisters heirs to the deceased "parents are bound to bring into "hotchpot or collation all that "they have received from their "deceased parents above the "others, either on the occasion of "their marriage or to advance or "establish them in life, unless it "can be proved that the deceased "parent, either expressly or "impliedly, released any property "so given from collation."

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help the child to set up a matrimonial home. Such gifts can seldom be made on the actual solemnization of the marriage. Their Lordships agree with both the lower courts in thinking that this is too narrow a construction to place on the section. They think that the relevant consideration is what, at the time of the gift, was the donor's intent. If the marriage, or contemplated marriage, was a factor inducing the gift, then the gift was made on the occasion of the marriage, and, in their Lordships' view, it is irrelevant that a marriage, in fact, never took place. Both the lower courts construed the section in this sense, and, so construing it, held as a fact that the gift was on the occasion of the marriage. Their Lordships see no reason for departing from their normal practice of not interfering with a concurrent finding of fact.

It was further argued that the donor impliedly released the property given from collation within the last sentence of the section, because, during the nine years in which he lived after the date of the gift, he took no steps to recall it. Once it be accepted that the gift was made on the occasion of the marriage, the burden is on the appellant to prove that the property was released from collation, and there are concurrent findings of fact by the lower courts that there was no such release. These findings, again, their Lordships accept. Their Lordships will humbly advise His Majesty that this appeal be dismissed, and that the appellant pay the respondents' costs of the appeal.

Solicitors for appellant: *Wilson, Lambert & Collis.*
Solicitors for respondents: *Stephenson, Harwood & Tatham.*

H. L. (Sc.)*
1944
June 12, 13, 14, 15;
Oct. 9.

[PRIVY COUNCIL.]

BLYTH AND OTHERS (MIRRIELEES' TRUSTEES) . . . . . . APPELLANTS

AND

LORD ADVOCATE . . . . . . RESPONDENT.

Revenue—Estate duty—Exemption—"Common soldier"—Home Guard killed during instruction—Finance Act, 1894 (57 & 58 *Vict., c.* 30), *s.* 8, *sub-s.* 1.

A company commander in the Local Defence Volunteers or Home Guard in the period before commissions were granted in

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* *Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT and LORD SIMONDS.

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that force was accidentally killed on duty during instruction on August 17, 1940:—

Held, (1.) that his status was no different from that of any other member of the force and (2.) that, though his service was only part-time, he was a " common soldier " within s. 8, sub-s. 1, of the Finance Act, 1894, and, accordingly, his estate was exempt from estate duty.

Decision of the Second Division of the Court of Session (sub nom. *Lord Advocate* v. *Mirrielees' Trustees*), 1943, S. C. 587, reversed.

APPEAL from the Court of Session.

The respondent brought an action against the appellants for payment of 64,000*l.* as estate duty in respect of the property which passed on the death of Frederick Donald Mirrielees, formerly a major in His Majesty's forces. The following averments were set out in the condescendence and answers thereto. In condescendence 1, it was averred that the respondent sued for and on behalf of the Commissioners of Inland Revenue and that the appellants were the executors and trustees acting under the will of the deceased. In condescendence 2 it was averred that " the deceased was a company " commander in the Perthshire area of the Home Guard. " On August 17, 1940, while on duty with other members of " his company at Garth, he was killed by the explosion of " a hand grenade accidentally dropped in the course of instruction which was being given to the company by a " sergeant of the regular army." In answer 2, it was averred that the Home Guard " had the duty of training themselves as " soldiers and under local arrangements this duty was intensively undertaken, many hours being spent each week " in the evenings and at week-ends. Every member was " required to hold himself in instant readiness to turn out " upon the receipt of a warning arranged to be given in the " event of imminent or actual invasion. From the receipt of " this warning the services of members ceased to be part-time " and became whole-time and complete in the same way as " those of any other soldiers belonging to the armed forces. " To facilitate organization and operational control it was " necessary that local leaders should be created, and for this " purpose the appointment of persons to act in this capacity " was provided for. Such appointments, which were only of " an acting nature, conferred no rank upon their holders and " in no way altered their status. . . . No privileges of any " kind attached to the holding of an appointment, and as " regards e.g. travelling warrants, medical services, and "issue of uniform and equipment, and in all other respects, "such persons were treated in the same way as all other "members of the Home Guard, viz. as private soldiers. . . . "Persons holding appointments possessed none of the powers "of summary discipline and punishment possessed by officers "in the army. In operations a Home Guard commander had "no authority to give orders as an officer to members of the "regular forces, and where an officer of the regular army was "present it was his duty to assume command irrespective of "the fact that the Home Guard commander's designation "might be indicative of an appointment to a higher command. "The position of a Home Guard commander was simply "that of a private soldier placed by order of a superior officer "in acting command of a body of other private soldiers. . . . ." In condescendence 3 it was averred that "it has been the "practice of the Commissioners of Inland Revenue to exempt "from probate or inventory duty, in the case of a death before "August 2, 1894, and from estate duty, in the case of a death "on or after that date, the property of any person who was, "at the time of his death, a member of the regular armed "forces of the Crown, provided that the rank of such person, "if he was a member of the land or air forces, was inferior "to that of sergeant. . . . The Inland Revenue Department "has been unable to trace the existence of any such practice "before August 2, 1894, regarding members of the reserve "forces of the Crown. It has been the practice to give exemp-"tion from estate duty, in the case of the death on or after "August 2, 1894, of a person who was, at the time of his "death, a member, giving full-time service, of one of those "forces which had been raised, mobilized or embodied for "full-time service against an enemy. No evidence has been "found that it was ever the practice to give exemption in the "case of a person who was, at the time of his death, a member, "giving only part-time service, of one of those forces. . . ." The appellants pleaded that "the deceased having been at "the time of his death a 'common soldier' within the meaning "of the Finance Act, 1894, his estate is exempt from estate "duty." The case was heard in the procedure roll when the Lord Ordinary, Lord Keith, without requiring evidence to be given, repelled the plea-in-law for the appellants. The appellants reclaimed and, after some supplementary information as to past practice had been by consent added to the record, the Second Division of the Court of Session (the Lord Justice

Clerk, Lord Cooper, and Lord Jamieson, Lord Mackay dissenting) adhered to the interlocutor of the Lord Ordinary. The appellants appealed to the House of Lords.

The relevant regulations governing the Home Guard were as follows: (A.) The Defence (Local Defence Volunteers) Regulations, 1940 (St. R. & O., 1940, No. 748) dated May 17, 1940, as amended by an order in council (St. R. & O., 1940, No. 1383) dated July 31, 1940, which provided: " . . . . " 2.—(1.) There shall be established a force to be called the Local " Defence Volunteers consisting of such male British subjects " as may, in accordance with instructions issued by the Army " Council, voluntarily undertake to serve therein without pay, " and be accepted for such service. (2.) The period for which " persons may be enrolled to serve in the Local Defence " Volunteers and the conditions of their service therein shall " be such as may be prescribed by instructions issued by the " Army Council . . . . Provided that such instructions shall " not require members of the Local Defence Volunteers— " (*a*) to give whole-time service; or (*b*) to live away from their " homes; or (*c*) to enrol for a period exceeding the period of the " present emergency; and shall provide for enabling the " service of any member to be determined by competent " authority at any time, or at his own request by 14 days' " notice in writing given by him. (3.) Members of the Local " Defence Volunteers shall be members of the armed forces of " the Crown and every such member shall, notwithstanding " that he may hold any rank or commission in any other of His " Majesty's forces, be subject to military law as a soldier, and " accordingly the Army Act shall have effect as if after " para. (8A.) of s. 176 thereof there were inserted the following " paragraph:—' (8B.) All members of the Local Defence " ' Volunteers.' 3. The Local Defence Volunteers constituted " under these regulations may be known by the alternative " title ' the Home Guard '." (B.) Army Council Instruction No. 924 of 1940 dated August 15, 1940, cancelling A.C.I. No. 653 of 1940, and providing with regard to the Home Guard: " . . . . (2.) Object. The object of the force is to " augment the local defences of Great Britain by providing " static defence of localities and protection of vulnerable and " key points and by giving timely notice of enemy movement " to superior military organizations. It is emphasized that the " force has been assigned a definite role in the defence plans of " the country . . . . (4.) Organization and Administration.

" (*a*) The Home Guard will be organized and administered by " the War Office ; (*b*) The Commander-in-Chief, Home Forces, " will exercise operational control. He will be responsible for " the training of the Home Guard under the direction of the " War Office ; (*c*) The Home Guard in each area will be " organized and commanded by military area commanders " through Home Guard area commanders, under the direction " of G.Os. C.-in-C., army commands . . . . (6.) Appoint- " ments and Reversions. This is a citizen force organized on " the principles of equality of service and status. There is " accordingly no system of 'ranks,' although there are " 'appointments' suitably graded for the commanders of the " various formations. All appointments will be acting and " unpaid . . . . (8.) Discipline. (*a*) The Home Guard forms " part of the armed forces of the Crown and an enrolled " volunteer is, under s. 176 (8B.) of the Army Act, subject to " military law as a soldier notwithstanding that he may hold " a rank or a commission in any other of His Majesty's forces. " (*b*) Summary punishments shall not be awarded to " volunteers." The provision of uniform and equipment and arms and ammunition was dealt with by paras. 14 and 16. (C.) A Royal Warrant dated December 9, 1941, which provided : " (1.) As from June 5, 1940, Our Warrant of June 29, " 1940, for the retired pay and pensions of members of our " military forces disabled, and of the widows, children and " dependants of such members deceased, in consequence of " the present war, shall, subject to the following provisions " of this Our Warrant, apply to members of the Home Guard " and to their widows, children and dependants in all respects " as if the expression 'Member of the Military Forces' as " defined by art. 2 (1.) of Our said Warrant of June 29, 1940, " included a member of the Home Guard. (2.) For the " purpose of the application of our said warrant of June 29, " 1940, to members of the Home Guard and to their widows, " children and dependants—(*a*) a member of the Home Guard " shall be treated as if at all material times whilst serving as " such a member he were a soldier of the Army on full pay " holding the substantive rank of private and not serving on " a normal engagement in Our Regular Army . . . ." (D.) The Home Guard Officers' Commissions Order in Council, 1940 (St. R. & O., 1940, No. 2017) dated November 19, 1940, and the Home Guard Officers' Commissions Order in Council, 1941 (St. R. & O., 1941, No. 186) dated February 12, 1941, provided for the granting of commissions in the Home Guard.

The Dean of the Faculty (*McIntyre K.C.*) and *Williamson* (both of the Scottish bar) for the appellants. The deceased was at his death a " common soldier " within the meaning of s. 8, sub-s. 1, of the Finance Act, 1894. This is in harmony with the practice of the Inland Revenue during the war of 1914–18 which allowed exemption from estate duty in the case of territorials. The sub-section goes to status and the status of a common soldier is essentially the same, whether he be serving in the regular army, the territorial forces, or the Home Guard. The conditions of service are irrelevant. The Oxford Dictionary defines " common soldier " as " an ordinary " member of the army without rank or distinction of any kind." There is no reason for thinking that in this Act the word " soldier " is used in a limited and technical sense. It does not follow because it may be used in a technical sense in a military Act that it is so used in a Finance Act. In the sub-section the words " who are slain or die in the service of Her Majesty " mean that the death must be in some way attributable to the service and do not necessarily import continuous whole-time service. The exemption in the Act of 1894 can be traced back to s. 6 of the Stamp Act, 1694 (5 & 6 W. & M., c. 21), which exempts " the probate of any will, or letters of administration, of any common seaman or soldier, who shall be " slain or die in Their Majesties' service." In 1694 many sorts of troops were known to Parliament, e.g., feudal levies, the militia, the standing army. There was no reason for excluding from the operation of the Act all troops save the relatively novel regulars. On the contrary, the natural thing is to understand the phrase as comprising all the members of the armed forces in a general way, the word " common " restricting it to the rank and file since otherwise the word " soldier " would have included officers. A Scottish Act " Anent the maintenance of " the Armie " (1645, c. 124) (Record edition, Vol. 6, p. 170) refers to " common soldiers " in this sense. The Act of 1662 " for " ordering the forces in the several counties of this Kingdom " (13 & 14 Cha. 2, c. 3) used the nomenclature " officer " and " soldier." The militia which was dealt with in that Act was an auxiliary force altogether different from the standing army and, in contrast to it, not in continuous service. The Militia Act, 1786 (26 Geo. 3, c. 107), uses the words " officers and " private men of the militia " and " officers and private men " of His Majesty's other regiments of foot " indifferently for both branches of the service (s. 103). By s. 141 of the Mutiny

Act, 1815 (55 Geo. 3, c. 108), it was provided that nothing in the Act was to apply to the militia, except where, by any Act for regulating the militia, the provisions of that Act were extended to " the officers and soldiers of the militia forces." In the Army Act, 1881, part II., which is designed to apply only to the regular army, there is reference to " a soldier of " the regular forces," thereby implying the existence of other forces, while part I., dealing with discipline, which is designed to apply to all branches of the service, refers simply to soldiers. By para. 2 (1.) of the Defence (Local Defence Volunteers) Regulations, 1940, every member of the force was made subject to military law as a soldier under s. 176 of the Army Act, being thereby placed in the category of rank and file: see s. 190.

Sir Donald Somervell A.-G., The Lord Advocate (*Reid K.C.*), *J. H. Stamp* (of the English Bar) and *J. F. G. Thomson* (of the Scottish Bar) for the respondents. The meaning of the words in s. 8, sub-s. 1, of the Finance Act, 1894, is restricted to " whole-time " soldiers, including territorials, who may be " whole-time " soldiers for a period after embodiment, or members of the Home Guard after muster, but not including " part-time " soldiers, such as the Home Guard before muster, who are not bound to give " whole-time " service or to enrol for a period exceeding that of the present emergency. The matter depends on the terms under which the man is serving. The words " who are slain or die in the service of His Majesty " refer to death while in that service and point to continuous non-interrupted service. The connexion between the death and the service is temporal rather than causal, and, provided the death takes place within the period of service, it is immaterial what is its cause. A gardener is in the service of his employer if he is employed " whole-time " but not so a man who comes in once a week to help him. A Home Guard before muster would not describe himself as a soldier, but as a lawyer or a dentist or whatever was his ordinary occupation. If a charity were established for discharged soldiers, a former Home Guard would not be eligible, nor could he be described as an old soldier. If he were regarded as a common soldier at all times his estate would be entitled to exemption in the event of death from any cause while he was an enrolled member of the force, which would be absurd. To regard him as a common soldier only during periods of training is too artificial. The natural construction restricting the words to persons in the "whole-time" service of the Crown receives support by analogy from sch. A to the Stamp Act, 1804 (44 Geo. 3, c. 98), which exempted from stamp duty the "certificate of marriage "of any common seaman, marine or soldier," since it could not apply to a "part-time" soldier who would necessarily be off duty at the time of marriage. Another distinction between the common soldier and the Home Guard is that the latter is unpaid, for a soldier is essentially a paid man. In 1694, it was probable that a soldier in the standing army would have no resources but his pay, whereas members of the trained bands or the militia might have considerable resources. Then, as now, a part-time soldier might carry on an occupation which was very remunerative. Before 1694, when the regular army was taking shape, there is in English law no trace of any such statutory exemptions from taxes or duties. The Act of 1894 and its predecessors were not concerned with the hardship of premature death in battle. That was dealt with by subsequent Acts, namely, Finance Act, 1900, s. 14; Death Duties (Killed in War) Act, 1914; Finance Act, 1924, s. 38; Finance Act, 1940, s. 64, sub-s. 1; Finance Act, 1941, s. 46: see Dymond on Death Duties, 9th ed., p. 175. The exemption is accorded in the case of death from any cause. Moreover, the distinction in the Act of 1894 is not simply between officers and men, for in practice the line has been drawn below the rank of sergeant. The provision in the Defence (Local Defence Volunteers) Regulations, 1940, para. 2 (3.), that every member of the force was to be subject to military law as a soldier meant that he was to be so subject as if he were a soldier. It was directed to discipline on duty, and neither it nor the Army Act can affect the construction of the Finance Act, 1894, which is directed to a wholly different object. Moreover, the Army Act itself makes a distinction, referring to "soldiers of the regular "forces": s. 176 (1.); and "men belonging to the territorial "army": s. 176 (6A). Further, as a company commander the deceased could not in any event be a common soldier. In dealing with a new formation like the Home Guard effect must be given to such distinctions, as in the case of the regular army.

The Lord Advocate (*Reid K.C.*) following. Several Scottish Acts of Parliament dealt with military service including the following, cited according to the duodecimo edition of the statutes: "Of the manner of weapon-schawinges" (1425, c. 60); "That all men be reddie for defence of the realme and in "quhat maner". (1456, c. 56); "Weapon-schawinges, fute-"ball, golfe and archers" (1457, c. 64); "An humble tender "to His Sacred Majesty of the duty and loyaltie of his ancient "Kingdom of Scotland" (1663, c. 26), an Act establishing the militia; "Act concerning the militia" (1669, c. 2), in which "soldiers" are mentioned; "Act for a voluntary offer of a "new supply to the King's Majesty" (1681, c. 3), in which "soldiers" were referred to in connexion with the prohibition of free quartering; "Act anent the levy of a thousand men" (1696, c. 23), in which the word "soldiers" was used; "Act "anent quartering of soldiers" (1698, c. 9), in which "soldiers" were mentioned several times and "common soldiers" once. The medieval host was much more like the modern Home Guard than the regular army, and the men constituting it were not called soldiers in these statutes. The term "soldier" came in with the raising of the militia and forces approximating to a modern army. Stress must be laid on the word "common." Even assuming that Home Guards are soldiers, they are not "common soldiers," particularly those who hold appointments. "Common" may be used as equivalent to "private," indicating a soldier who does not hold any rank, but it also distinguishes an ordinary soldier of the regular army from a member of a force constituted on unusual lines. The members of the Home Guard are a representative body of ordinary citizens associated without pay in their spare time for home defence. Some of the considerations which moved the legislature to grant this exemption to common soldiers as distinct from officers are not applicable to them. The test is not merely death in the services of the Crown, but continuity of service. It depends on time and not causation and the question is whether the man was in the King's service at the time of his death. This is supported by several old Scottish statutes which provided for an analogous exemption. The first was a statute (1513, c. 102), made in Northumberland just before the battle of Flodden, which enacted that "gif ony man bais slaine or "hurt to death in the King's armye and hoist be Englishmen "or dies in the armye induring the time of his hoist his aires "sall have his waird, reliefe, and mariage of the King free, "dispendand with his age, quhat eild that ever he be of." Other similar statutes are: "Anent the waird, reliefe, and "mariage of the aires of them that decease in the hoast moved "contrain to Englishmen" (1522, c. 3); "Anent the tackes "and steadinges of them that ar slaine" (1522, c. 4); those

Acts dealing with " the disposition of benefices, wardes, reliefes, " and mariages, and of possessions of them that happenis to " die in the armie " (1546, c. 4, 5 and 6) ; " Anent kirk-men " that happenis to be slaine in our soveraine lordis service in " defence of his hienes authoritie " (1571, c. 41) ; " Anent " waird, relief and marriage of them, that sall happen to be " slayne in our soveraine lordes service in defence of his " Majesties authoritie " (1571, c. 42) ; " Anent possessions " (1591, c. 43) ; " Act anent persons killed in the Kings host " (1690, c. 37). The practice of the Inland Revenue before and after August 2, 1894, as set out in condescendance 3 indicates that hitherto continuity of service has been taken as the test and not whether death resulted from the service.

The Dean of the Faculty (*McIntyre K.C.*) in reply. Once a Home Guard has gone on duty his position is indistinguishable from that of any other fighting man and there is no difference in the quality of their service. The Home Guard's service is continuous while he is on duty. The old Scots Acts dealing with the like exemption were contemplating death as a result of service: see the provisions as to sickness taken in the army in the Acts of 1546. The most natural motive to attribute to Parliament in passing the Act of 1894 and similar Acts is the desire to grant relief in respect of certain imposts to the families of those who have given their lives : see the preamble to the Act of 1690. In referring to common soldiers the Act of 1894 was intended to indicate soldiers holding no rank : see Henry V, Act IV, Scene 1 : " . . . . art thou officer ? Or art thou " base, common and popular? " In the Home Guard a man appointed to lead was not lifted out of the rank and file till commissions were granted.

The House took time for consideration.

Oct. 9. Viscount Simon L.C. My Lords, on August 17, 1940, Mr. Frederick Donald Mirrielees (his title of Major was due to his having previously served in His Majesty's Forces with that rank and does not affect the present case) while on duty in Perthshire with other members of the Home Guard (then called the Local Defence Volunteers) was killed by the explosion of a hand-grenade accidentally dropped in the course of instruction which was being given to the company to which he belonged by a sergeant of the regular army. The question now to be decided is whether he died in the service of

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His Majesty as a "common soldier" within the meaning of s. 8, sub-s. 1, of the Finance Act, 1894. If so, his estate is entitled to complete exemption from death duties. If not, his estate has still been conceded the modified relief contemplated in such a case by s. 38 of the Finance Act, 1924.

The Lord Ordinary, Lord Keith, found himself able to decide the matter in favour of the revenue in a case instituted by the Crown to recover the full duties, on the pleadings and in the light of the official documents therein referred to, without requiring evidence to be given. His view was that the plea-in-law for the executors and trustees of Mr. Mirrielees' will, relying on s. 8 of the Finance Act, 1894, should be repelled. Lord Keith's conclusion in favour of the Crown was affirmed (after some supplementary information as to past practice had been by consent added to the record) by a majority of the Second Division of the Inner House (the Lord Justice-Clerk and Lord Jamieson, Lord Mackay dissenting).

Section 8, sub-s. 1, of the Finance Act, 1894, runs as follows: "The existing law and practice relating to any of the duties "now leviable on or with reference to death shall . . . . "apply . . . . for the exemption of the property of common "seamen, marines or soldiers who are slain or die in the service "of Her Majesty . . . . as if such law and practice were in "terms made applicable to this part of this Act." The reference of the above section to "existing law" is to part III of the schedule to the Stamp Act, 1815, which exempted from all stamp duties "probate of will, letters of administration, "confirmation of testament, and eik thereto, and inventory of "the effects of any common seaman, marine or soldier who shall "be slain or die in the service of His Majesty, his heirs or "successors." It is not disputed, and it is plainly right, that the epithet "common" applies to each of the three nouns which follow. This exemption of the estate of the "common soldier" who is slain or dies in the service of the Crown from stamp duty in connexion with probate can be continuously traced back through intervening English statutes as far as 5 & 6 W. & M., c. 21 (1694).

The circumstances of Mr. Mirrielees' death were such that it is not, and cannot be, disputed that he died in the service of His Majesty. By the Defence (Local Defence Volunteers) Regulations, 1940, bearing date May 17, 1940, it was provided that members of the Local Defence Volunteers (as the members of the Home Guard were then called) should be members of the armed forces of the Crown, and that every such member should be " subject to military law as a soldier " notwithstanding that such members might hold commissions in His Majesty's Forces, so that the Army Act should have effect as if, after para. 8A of s. 176, a new category was added, viz. " all members " of the Local Defence Volunteers." The contrast here is between s. 176, which prescribes what persons are subject to military law as soldiers, and s. 177, which prescribes what persons are subject to military law as officers. It was objected by the Crown that Mr. Mirrielees, although subject to military law as a soldier and serving His Majesty at the time of his death, could not in any case be regarded as a " common soldier " because he had been appointed to act as a company commander in the force under Army Council Instruction No. 924 of 1940. This document in para. 6, laid it down that the force " is a " citizen force organized on the principles of equality of service " and status. There is accordingly no system of ' ranks,' " although there are ' appointments ' suitably graded for the " commanders of the various formations. All appointments " will be acting and unpaid." No privileges of any kind attached to the holding of an " appointment." The holder, as regards travelling warrants, medical treatment, the issue of uniform and equipment, etc., was treated in exactly the same way as all other members of the force. Such was Mr. Mirrielees' position at the date of his death. A change was subsequently introduced by the Home Guard Officers' Commissions Order, 1940, which came into force on November 19, 1940 (St. R. & O., 1940, No. 2017), but, prior to this, all members of the force were equal in rank. I agree with the Lord Justice-Clerk (1) " that no difference in status could be drawn in August, 1940, " between one member of the Home Guard and another." Consequently this objection to the claim for exemption in Mr. Mirrielees' case fails, and the question to be decided is the broad question : Was every member of the Local Defence Volunteers as constituted in August, 1940, a " common " soldier ? "

The correct answer to this question depends on placing on the phrase " common soldier " in the statute its proper connotation. It does not depend on whether Parliament had in mind the particular application of the phrase which is now suggested, or on whether it would be easier to apply the phrase if it was construed with limitations not actually involved

(1) 1943 S. C. 587, 603.

in its meaning. The epithet "common" is, I think, introduced merely to exclude higher ranks. Thus, in Shakespeare's Henry V, Act IV, Scene 1, when the king, on the night before Agincourt, is touring the battlefield in disguise and comes upon Pistol, the following conversation ensues:—*Pistol.* "Qui va là?" *King Henry.* "A friend." *Pistol.* "Discuss unto me; "art thou officer? Or art thou base, common, and popular?" The Oxford Dictionary defines "common soldier" as "an "ordinary member of the army without rank or distinction of "any kind." The adjective "common" may, as Lord Mackay observed (1), convey any one of several meanings, but here I take it to mean "below a certain rank." We are informed that, in the application of s. 8 to the common soldiers of the regular army, the practice is to regard any soldier below the rank of sergeant as a "common soldier." Lord Keith was of opinion that where every man in a force was of the same rank as every other, the description of "common soldier" could not attach, since there was an absence of the contrast with officers which he thought necessary to give the phrase its application. "When "all are equal," he argued (2), "there is, I think, no room for "the common soldier." With all respect to the learned judge, I do not agree with this argument. It would seem more reasonable to argue that there would be no officers. But, by Army Council Instruction No. 924 of 1940, para. 4c, it is clear that the Local Defence Volunteers were commanded by Area Commanders of the regular army under the direction of G.Os. C-in-C. Army Command.

What, then, is the connotation of "soldier" in this connexion? And is an ordinary member of the Home Guard, while training or otherwise serving in that force, to be regarded as a "soldier" within the exemption of the Act of 1894? The powerful judgments of the Lord Justice-Clerk and Lord Jamieson reach the conclusion that a member of the Home Guard is not a "soldier." This conclusion largely turns on the contrast of language to be found in the statute book when dealing with the rank and file of auxiliary forces and the use of the word "soldier" to indicate an ordinary member of the regular army. Lord Cooper points out (3), for example, the absence of the word "soldier" in statutes dealing with members of volunteer forces and yeomanry (regulated by the Yeomanry Act, 1804) or of a local militia raised by ballot

(1) 1943 S. C. 611, 612

(2) Ibid. 593.

(3) Ibid. 587, 598.

(regulated by the Militia Act, 1812). Again, when the volunteers were revived half a century later under the authority of the Volunteer Act, 1863, Parliament did not describe the rank and file of such forces as "soldiers." The statutes spoke of "members" or "private men" or "volunteers." Similarly, when the Territorial and Reserve Forces Act, 1907, was passed, the term used for an ordinary territorial was "man of the "Territorial Force." The force of the argument is qualified by observing that s. 176 of the Army Act, when setting out what categories of persons are subject to military law "as "soldiers," begins with "all soldiers of the regular forces" which seems to imply that there may be soldiers who are not of the regular army and goes on to include men belonging to the territorial army when being trained or when embodied or when called out for actual military service, and men belonging to the volunteer forces of the United Kingdom in corresponding circumstances. Again, s. 190 of the Army Act provides that the expression "soldier" includes "every person subject to "military law during the time that he is so subject." "Regular forces," on the other hand, are there defined as "officers and soldiers who . . . . are liable to render con-"tinuously for a term military service to His Majesty."

While the majority of the Court of Session came to the conclusion that no one should be regarded as a soldier unless he belongs to the regular forces, the Attorney-General in his argument before this House felt constrained to admit that a member of the territorial force after embodiment and a member of the Home Guard after muster would come within the exemption of s. 8, sub-s. 1, of the Finance Act, 1894. He, therefore, proposed a different distinction, arguing that the exemption was restricted to "whole-time soldiers," and that no one who served only "part-time" in the forces should be regarded as a "soldier" He urged, in support of this contention, that the test of dying in the service of His Majesty pointed to continuous and non-interrupted service, and argued that an individual who gave part-time service would not naturally be called a soldier but would be described according to the profession or trade he was carrying on.

I have considered these arguments with much care, but it seems to me that they are not sufficient to outweigh the broad consideration that "soldier" is a wide word indicating a man (as distinguished from an officer) who serves the Crown in a military capacity. If this country had been invaded and bodies of the Home Guard had been called on actually to apply their training and their weapons to defend British homes, there would have been every reason to regard them as "soldiers." The meaning and application of the word in the Finance Act, 1894, cannot, I think, be rightly determined by contrasting the specific statutory terms used in earlier statutes to refer to members of our auxiliary forces. The word "soldier" indicates a genus of which there are various species. It is not, perhaps, irrelevant to note the interpretation put on s. 11 of the Wills Act, 1837, which authorizes "any "soldier being in actual military service" to dispose of his personal estate without complying with the formalities ordinarily required by the Act. No difficulty seems to have been felt in conceding this privilege to the case of an artillery officer in the territorial army who was ordered to rejoin his battery just before the outbreak of the present war: *In the Estate of Rippon* (1); or in the case of a private in a volunteer battalion who, after sending in his name for active service in the South African war, had been ordered into barracks with a view to being drafted to the seat of war: *In the Goods of Hiscock* (2); see also *In the Estate of Stanley* (3), where a nurse employed in a hospital ship was held to be a soldier for this purpose. An ordinary member of the Local Defence Volunteers or of the Home Guard at the time when he is training or serving is unquestionably subject to military law, and is wearing uniform and bearing weapons which are justified because he has enlisted to defend his country. He is, in my opinion, to be regarded, when so serving, as a "common "soldier" for the purposes of s. 8, sub-s. 1, of the Finance Act, and if he meets with death in the circumstances of Mr. Mirrielees, his estate enjoys the exemption which that section confers. It is not necessary in the present case to decide whether the cause of death must be related to the service being performed, as that is plainly so in Mr. Mirrielees' case. I move your Lordships that the appeal be allowed with costs here and below.

LORD THANKERTON. My Lords, I agree entirely with the opinion of my noble and learned friend on the woolsack, which I have had the opportunity of considering, and I will only venture to add a few observations of my own.

(1) [1943] P. 61.
(2) [1901] P. 78.
(3) [1916] P. 192.

We have to consider the nature and extent of a right which is a statutory one. It has been suggested that the use of the phrase "the existing law and practice" in s. 8, sub-s. 1, of the Finance Act, 1894, made it relevant to consider the practice of the inland revenue in the period prior to August 2, 1894, as also during the subsequent period, as averred in condescendence 3. It seems clear, apart from the Act of 1894, that the practice of the inland revenue could not affect or alter the statutory right conferred by the Stamp Act, 1815, and earlier statutes. It seems equally clear that the Act of 1894 refers only to the practice then existing and not to any subsequent practice. In my opinion, the reference to practice was in contrast to the then existing law, and was not intended to, and did not, alter the nature or extent of the statutory right conferred by the Act of 1815. The words of Lush L.J. in *Poyser* v. *Minors* (1), appear to me to apply to the present case, viz., "Practice, in its larger sense, ... denotes the "mode of proceeding by which a legal right is enforced, as "distinguished from the law which gives or defines the right." The Lord Ordinary and two of the learned judges of the Second Division have referred to old Scots Acts of 1645 and 1647, but I cannot think that these Acts of the Scottish Parliament are of much relevance on the construction of the Act of the English Parliament of 1694. If they were relevant a further examination of the Scots Acts would be necessary, and several in the last two decades of the seventeenth century might prove more useful. In my view, any such digression would not be of assistance in the present appeal.

I concur in the motion proposed by my noble and learned friend.

LORD MACMILLAN. My Lords, the estate of any "common "soldier" who is slain or dies in the service of His Majesty is by statute totally exempted from estate duty. The question for decision by your Lordships is whether this exemption applies to the estate of a member of the Home Guard. The late Major Mirrielees was killed on August 17, 1940, by the accidental explosion of a hand grenade while undergoing as a Home Guard a course of instruction by a sergeant of the regular army. That he was slain or died in the service of His Majesty was not questioned, but the Crown contended that he was not

(1) (1881) 7 Q. B. D. 329, 333.

at the time of his death a "common soldier" within the meaning of the statutory exemption.

The exemption of the estates of common soldiers slain or dying in the King's service from stamp and other duties has a long legislative history, and in the opinions of the learned judges of the Court of Session, as well as in the arguments at the bar of this House, your Lordships have had the benefit of exhaustive research both as to the constitution and characteristics of the armed forces of the Crown for several centuries and as to the nomenclature employed by Parliament in describing the members of these forces at different times. I do not say that this investigation, though inconclusive, has been without value, but I prefer to approach the question at issue more directly. When the exemption was conferred there was no Home Guard in existence and the legislature cannot have had in contemplation a non-existent body, but, in conferring the exemption, it employed certain terms, and the question is whether these terms, when fairly construed under present-day conditions, are apt to include the case of the Home Guard. Such problems in the application of the language of enactments to unforeseen developments are not uncommon. When the Telegraph Acts of 1863 and 1869 were passed no one had thought or heard of telephones, and in 1880 the question arose whether the provisions of the Telegraph Acts applied to this new form of transmitting messages. "Of course, no one "supposes," said Stephen J., "that the legislature intended to "refer specifically to telephones many years before they were "invented, but it is highly probable that they would, and it "seems to us clear that they actually did, use language "embracing future discoveries as to the use of electricity for "the purpose of conveying intelligence." And so it was held: *Attorney-General* v. *Edison Telephone Co. of London, Ld.* (1).

Can then the expression "common soldier" be fairly said to embrace a member of the Home Guard? As to the epithet "common," I think there can be little doubt that it denotes merely a soldier who is a member of the rank and file as distinguished from a commissioned officer, and I do not accept the suggestion of the Lord Advocate that it conveys in addition a secondary implication of "ordinary" as distinguished from "unusual." It was on the meaning of the word "soldier" that the controversy at the bar mainly centred. The Attorney-General, as I understood him, was not prepared to confine the

(1) (1880) 6 Q. B. D. 244, 254.

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term to a member of what are designated as the regular forces of the Crown. He ultimately found his criterion in continuity of service, and relied chiefly on the fact that a member of the Home Guard is not bound to give whole-time service to the Crown, or to enrol for a period exceeding that of the present emergency, but that is tantamount to limiting the exemption to members of the regular forces on permanent service, which he disclaimed. It is the character of the service, namely that of a soldier in the service of the Crown, rather than the duration of the service which is material, and I see no reason to add to the statutory words an implied condition of continuity of service.

I should have thought that much the most authoritative source to consult for the meaning of the word " soldier " was the current and annually re-enacted Army Act. There I find, in s. 190, that the expression " soldier " includes " every " person subject to military law during the time that he is so " subject." Then I find that by para. 2 (3.) of the Defence (Local Defence Volunteers) Regulations, 1940, every member of the Local Defence Volunteers (subsequently the Home Guard) is a member of the armed forces of the Crown and " subject to military law as a soldier." And s. 176 of the Army Act is by these regulations amended so as to include among the persons " subject to military law as soldiers " all members of the Local Defence Volunteers, or Home Guard. It was suggested that the words " as soldiers " means " as if they " were soldiers," but that will not do, for the first category mentioned in s. 176 is " all soldiers of the regular forces," and it would be absurd to enact that " all soldiers of the regular " forces " are to be subject to military law " as if " they were soldiers. A member of the Home Guard, then, is a soldier within the meaning of the Army Act. I can see no reason why he should not equally be a soldier within the meaning of the Finance Act, 1894, and, if he holds no commission, be entitled to the benefit thereby conferred on common soldiers.

The Crown rather half-heartedly suggested that Major Mirrielees was, in any event, not a " common " soldier because he held an acting appointment as a company commander in the Home Guard at the time of his death. The point is not taken in the reasons annexed to the Crown's printed case to this House, and, in my opinion, it is not well founded. The Army Council Instruction No. 924 of 1940, dated August 15, 1940, expressly states in para. 6 that the

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Home Guard is " a citizen force organized on the principles " of equality of service and status. There is, accordingly, no " system of 'ranks,' although there are 'appointments' " suitably graded for the commanders of the various formations." This has since been altered, but at the time of Major Mirrielees' death every member of the Home Guard, if he was, as I hold, a soldier, was also a common, that is, a non-commissioned, soldier.

As Major Mirrielees, when he met his death, was undoubtedly engaged in the performance of military duties in the service of the Crown, and as his death was due to his performance of those duties, I do not find it necessary to discuss the problems which were raised as to the position of a Home Guard dying from causes not associated with his service or dying subsequently in hospital from injuries received while on military duty. There points were quite properly raised to test the interpretation of the words of the statute, and indicate difficulties in its application, but they need not be decided now if it is held, as I hold, that the present case falls within the statutory exemption, whatever may be said as to other cases. I am, accordingly, in favour of allowing the appeal.

LORD WRIGHT. My Lords, s. 8, sub-s. 1, of the Finance Act, 1894, is in the following terms: " The existing law and " practice relating to any of the duties now leviable on or with " reference to death, shall . . . . apply for the purpose of " the collection recovery and repayment of estate duty and " for the exemption of the property of common seamen, " marines or soldiers who are slain or die in the service of Her " Majesty." The existing law there referred to is contained in the schedule, Part III, to the Stamp Act, 1815, which exempted " from all stamp duties, probate of will, letters of administra- " tion, confirmation of testament, and eik thereto and inventory " of the effects of any common seaman, marine or soldier, " who shall be slain or die in the service of His Majesty, his " heirs or successors." That Act repeated an identical provision contained in the schedule, part III, of the Probate and Legacy Duties Act, 1808. The same exemption had appeared in s. 6, of the Stamp Act, 1694, which provided " that nothing " in this Act contained shall extend to charge the probate of " any will, or letters of administration, of any common seaman " or soldier, who shall be slain or die in their Majesties' service." The material questions are whether Major Mirrielees was

(1.) a soldier, (2.) a common soldier, (3.) in the service of His Majesty, (4.) who died in that service. I disregard the "practice" referred to in the Act of 1894 because no practice material to this case is proved.

The facts are that Major Mirrielees met his death because his duty as a Home Guard involved his taking part in a course of instruction in the use of hand grenades, one of which having been accidentally dropped exploded and caused his death. He was at the time a member of one of the armed forces of the Crown, namely, the Home Guard, engaged in training to defend his country. The handling of grenades is notoriously dangerous, but it is a necessary part of a soldier's training. He was thus, in my opinion, a "soldier" who died in His Majesty's service. The section is remedial and should be construed, if not benevolently, at least fairly. It confers a benefit in favour of those who give their lives in the service of their country. The conditions are that they must be capable of being described as soldiers, and as common soldiers. In regard to the latter condition the Second Division were in the appellants' favour, as I think rightly, but the main issue, whether at the moment of the accident, Major Mirrielees was a "soldier," is a question which depends on what that word means in the section. It is dangerous to attempt a comprehensive and universal definition of so ordinary a word, but in the present context I think it may be defined as meaning a member of the armed forces of the Crown subject as such to military law while on actual service. This is a matter of status and function which in the case of an auxiliary force like the Home Guard may be intermittent and interposed between longer or shorter periods of civilian life. There is no direct authority on the point.

The Home Guard (originally known as the Local Defence Volunteers) was established by Order in Council the Defence (Local Defence Volunteers) Regulations, 1940 (St. R. & O. 1940 No. 748) dated May 17, 1940, at a time when the danger of invasion seemed both serious and imminent. Volunteers for the force were, under the order, to undertake to serve without pay according to conditions of service prescribed by instructions issued by the Army Council, but were not to be required to give whole-time service or to live away from their homes or to enrol for a period exceeding the period of the emergency. A member's service could be determined by fourteen days' notice in writing given by him. It was, in particular, expressly enacted by para. 2 (3.) of the order that "Members . . . . shall be "members of the armed forces of the Crown and every such "member shall, notwithstanding that he may hold any rank "or commission in any other of His Majesty's forces, be subject "to military law as a soldier and accordingly the Army Act "shall have effect as if after para. 8A of s. 176 of the Act there "were inserted the following para. 8 (*b*), 'All members of the "'Local Defence Volunteers'" [later the Home Guard]. That means that they were to be subject to military law as soldiers. With this must also be read s. 190 of the Act which defines "soldier" in that Act as excluding officers but as otherwise including "every person subject to military law "during the time that he is so subject." It is thus clear that at least within the purview of the Army Act, a member of the Home Guard is a soldier, though only a part-time soldier, during the time that he is subject to military law. On July 31, 1940, by Order in Council the Local Defence Volunteers were to be known by the alternative title of the Home Guard. On August 15, 1940, two days before Major Mirrielees met his death, further directions were given in Army Council Instruction No. 924 of 1940. The object of the force was there defined in para. 2 to be "to augment the local defences of Great Britain "by providing static defence of localities and protection of "vulnerable and key points by giving timely notice of enemy "movement to superior military organizations." The force, it was declared, had "been assigned a definite role in the defence "plans of the country." The instruction also provided, by para. 6, for a system of "appointments," acting and unpaid, suitably graded for the commanders of the various formations, but it was repeated that "this is a citizen force, organized on "the principles of equality of service and status." If a member held a commission, as Major Mirrielees did, in the reserve, his commission was to be dormant while he was a member of the Home Guard. He was to serve as a soldier and be subject to military law as such. The Home Guard was to be organized and administered by the War Office, and the Commander-in-Chief, Home Forces, was to exercise operational control together with other subordinate Army Officers acting under him: para. 4. Paragraph 8 dealt with discipline. It is true that by Orders in Council dated November 19, 1940, and February 12, 1941, commissions in the Home Guard were to be granted to members holding appointments. This, however, was after Major Mirrielees' death. In December, 1941, by Royal Warrant, the existing provisions of the warrant of June 20, 1940, for pensions and retired pay to members of the military forces and their dependants, was extended retrospectively as from June 5, 1940, to members of the Home Guard, subject to various adjustments, but it was stated that a member of the Home Guard, while serving as such member, was to be treated as if he were a soldier of the Army on full pay, holding the substantive rank of a private and not serving in a normal engagement in the Regular Army: para. 1. This provision was treated by the authorities as applying to Major Mirrielees at the time of his death. It is, I think, clear that, if he was a soldier, as I think he was, he was a "common soldier" in the Home Guard.

The case was tried on the pleadings and documents, with particular reference to the statutory rules and orders to which I have referred, and on the Army Act, but when it came before the Second Division certain further averments of fact were introduced and admitted by the Crown as correct. In particular, I may note the averments that the Home Guard, having the duty to train themselves as soldiers, carried out this duty intensively, many hours being spent each week in the evenings and at week-ends. Every member was required to hold himself in instant readiness to turn out on the receipt of a warning which it was arranged was to be given in the event of imminent or actual invasion. From the receipt of this warning the services of members ceased to be part-time and became whole-time and complete in the same way as those of any other soldiers belonging to the armed forces. As to "appointments," the new averments emphasized that they were only of an acting nature and did not change the status of, or confer any rank on, their holders who had no power to order dismissal or punishment such as that possessed by officers of the army and no power to give orders as officers to members of the regular forces or to assume command over a regular officer. I may add that the Home Guard had uniforms, equipment and weapons supplied to them.

In view of these facts, it may be asked why a member of the Home Guard does not satisfy all essential characteristics of a soldier, even though his employment is limited to home defence and his service is not continuous but is intended to be compatible in general with his living at home and pursuing his usual avocations. He is, during periods of duty, a member of the armed forces of the Crown, subject to military law, and he is liable to be called up for full-time service. In opposition to this view the main objection taken by the Lord Justice-Clerk (1) was that " common soldier," as the term is used in the Finance Act, 1894, means " a member of the rank and file " of a full time force, whose services are given continuously " and exclusively to His Majesty for the period of his (usually " prolonged) engagement, and who as a consequence receives " his maintenance and appropriate pay and allowances for " his services—in other words, the ordinary serving member " of the regular British Navy or British Army." I think that this part of his judgment expresses the acid test which he adopts. The Attorney-General, however, did not contend in his argument before your Lordships that the meaning of the word " soldier " as used in the Finance Act, 1894, was limited to a member of the regular forces, but he insisted that the element of continuity of service was the essential characteristic connoted by " soldier." The Lord Advocate advanced the further contention that a member of the Home Guard (particular if he had an " appointment ") did not answer to the description of a " common soldier," but was at best an " uncommon soldier." The word " common," he argued, was used in a pregnant or twofold sense and as indicating not only the absence of rank, which is the ordinary sense in which the epithet " common " like the synonym " private " is applied to a soldier, but as meaning also that the particular man was of the common or ordinary type of soldier. This, it was said, could not be predicated of the Home Guard because its members, if soldiers of any type, were soldiers of an extraordinary or unusual type, particularly if the soldier held an appointment. As to the definition of soldier in s. 190 of the Army Act already quoted, and the express inclusion in s. 176 (8B) of members of the Home Guard in the category of soldiers because subject to military law, it was contended for the Crown that this provision of the Army Act was directed to an object foreign to that of the Finance Act because it was directed mainly to the discipline of Home Guard members when actually on duty. It was also said that the provisions in the Army Act could not govern the construction of the material section of the Finance Act, 1894, the purpose of which was to give relief from taxation to common soldiers, but they go to show what the word " soldier " means in the Act.

(1) 1943 S. C. 587, 601.

I do not question that the word "soldier" may have different meanings in various contexts. Thus, in s. 11 of the Wills Act, 1837, which exempts a soldier on actual military service from the ordinary restrictions which have to be observed to make a valid will, and enables him to make a nuncupative will, the word "soldier" has received the widest interpretation in the Probate Court. It has been held to include both officers and the rank and file, and to include, at the time of the Boer War, volunteers, and, in the last war, territorials and nursing sisters. I may refer, as one instance, to *In the Estate of Rippon* (1). The problem in such cases was different, no doubt, but they indicate that the word "soldier" does not bear a fixed or limited meaning. A member of the Home Guard is clearly a soldier for some purposes at least. Section 176 of the Army Act, as amended ad hoc, provides in terms that he is to be subject to military law "as a soldier." No doubt, the anthithesis there is primarily between an officer whose position is dealt with in s. 175 and a soldier who comes under s. 176, but that latter section includes by express words, not merely "soldiers of the regular army," but also "members of the Home Guard." The words "as a soldier" or "as soldiers" govern the whole of s. 176. What is meant is that the categories specified in the section are all categories of soldiers. The Home Guard is one category. But, all the same, it is said, the general usage of the Army Act is to distinguish between the regular or standing army and the auxiliary forces by restricting the word "soldier" to the regular forces and by referring to members of the auxiliary forces not as "soldiers" but as "men." This is true of the nomenclature generally followed in the Army Act. Thus, s. 176 (1.) applies to "All soldiers of the regular forces," whereas s. 176 (6A), for instance, applies to "All non-"commissioned officers and men belonging to the territorial "army." The new class 8B is similarly described as consisting of "members of the Local Defence Volunteers," but the Attorney-General does not suggest that men of the territorial army, or, in earlier days, of the volunteer forces, were not soldiers when serving as the volunteers did in the Boer War or as the territorials did in the last war and do now in the present war. Whatever the reason for this particular distinction in nomenclature, it cannot import that men of the reserve or auxiliary forces are not soldiers when on duty or serving. These verbal differences in the Army Act could not be regarded as important even if the distinction had been universally drawn, but it is not so, at least in the earlier Acts. Thus, in the consolidated Militia Act, 1786 (26 Geo. III, c. 107), by s. 89, it is enacted "that any sergeant or corporal of "militia may . . . . be reduced to the condition of a private "soldier of the militia." Thus, the term "soldier" was applied to the auxiliary force not many years before the Act of 1815. In the Militia Act, 1662, there are constant references to the rank and file of the militia as "soldiers." For instance, in s. 8, soldiers were to be punished if they "do not their "duties as soldiers," and in s. 28 there is a prohibition against an officer or soldier of the militia or trained bands being mustered beyond their boundaries.

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(1) [1943] P. 61.

I think that the statutory expressions which I have quoted justify the conclusion that the word "soldier," as used in the Finance Act of 1894, is apt to include members of the Home Guard. The Army Act, in particular, raises difficulties, as it seems to me, in the way of the Attorney-General's argument that the crucial test of a soldier is continuity of service. He cannot mean only such continuity as there is in the case of a soldier of the regular army, who enlists for life or for a fixed number of years, as contrasted with a man of the auxiliary forces, such as the Army Reserve or the Territorials, who only have the status of soldiers in the various circumstances and at the various times detailed in s. 176 of the Army Act. In substance, these are on the same footing as the Home Guard. Continuity is thus a question of degree. The continuity is, no doubt, less close and exacting in the case of men of the Home Guard as compared with men of the reserve or the territorial forces. The real question in each case is one of status and function. If the status or function is intermittent, the title to be called "soldiers" is also intermittent. The Home Guard have accordingly, in my opinion, both the status and duties of soldiers at such periods as they are exercising or training or on duty, or called up to meet an emergency. Such an accident as befell Major Mirrielees and his comrades who died with him when the grenade exploded shows, what is familiar now, that modern methods of Army training are both realistic and dangerous. Soldierlike qualities and soldierlike services are required whenever members of the Home Guard are called up to watch and guard important, and, perhaps, threatened, points, bridges, lines of communication, buildings and the like. Above all, the Home Guard soldier may be called up to defend his country against threatened invasion by sea or by air, perhaps by German commandoes landing from parachutes near his village.

In my opinion, this conclusion agrees with the ordinary use of the word "soldier." I think that the word all through the vicissitudes of its long history, which extends for over six centuries, has borne substantially the same meaning, that is, a serving member of an armed force. As a natural concomitant some form of subjection to military discipline is implied, though it was not until the Militia Act, 1757, that the militia was made subject, when embodied, to the Mutiny Act and Articles of War, and not until 1761 that the Mutiny Act was applied to the militia when training as well as when embodied (Militia Act, 1761, s. 99). There is a substantial similarity between the auxiliary armed forces as they existed in 1815 and as they existed in 1894, and the volunteers of 1815 bore a close resemblance to the Home Guard. The militia and yeomanry and the later volunteers may be treated as corresponding to the territorial forces in which they were merged in recent years. If we go further back we find that the militia had developed out of the trained bands and the general levy. There is, thus, a general similarity throughout in the character of the armed forces of the Crown and of the "soldier" as a member of them. They were not necessarily professional or whole-time soldiers.

If we turn to literary and popular language, "soldier" is the name used to connote a member of the rank and file of the armed forces for many centuries, long before the days of standing armies. This appears from the Oxford Dictionary (s.v. soldier). It can be copiously illustrated from Shakespeare. He uses the word "soldier" whenever he has to refer to members of armed forces, of whatever country or nation, Roman, English, French, Scottish, without distinguishing whether they were long service or short service soldiers or how they were drilled and armed. He would not have distinguished between regular soldiers and auxiliary soldiers. Indeed, the distinction did not exist in his time. The feudal levy or the general levy were called up at uncertain emergencies and for limited periods of service. Men served for longer periods on occasion, for instance, in the Hundred Years War and in the Civil War. It was not until after the Restoration that the idea of standing armies became familiar and led to their being conditionally legalized in time of peace at the Revolution

Settlement. I cannot think that the legislature in 1694 had in mind as the sole type of soldier a member of the standing army. Nor would this be so in 1815 or 1894. As a later instance of the popular use of the word "soldier," I may take from the Oxford Dictionary (s.v. soldier) Hume's observation in 1752 that "a continual succession of wars makes every "citizen a soldier." It has also been urged that the Home Guard were an unpaid force and that a soldier ex vi termini must be a paid man. No doubt, as a matter of etymology, "soldier" is derived from solidus, or coin, but I do not find that payment has been regarded as an essential characteristic of a "soldier" as it is in the case of mercenaries.

My conclusion is that the word "soldier" does not necessarily mean a man whose general occupation is military service or continuous military service, and that, not only at the present day, but all through history, military service may be only the temporary or occasional or intermittent occupation of the man. He is a soldier only when he is serving or acting or on duty as a soldier. At such times he has the privileges and responsibilities of a soldier and would be called a soldier. At other times he may be a butcher or a baker or a stockbroker or a solicitor. I do not think it necessary to consider here the difficult question which might arise when a man dies, after his service has ended, of injuries sustained while he was serving. Something might be said for the view that the material thing was that the man got his "death wound" while on service. I am also disposed to think that there must be more than a mere temporal connexion between the service and the death. I do not, however, think that these problems help the decision of the present case. Major Mirrielees's death was immediately and directly caused by the service on which he was engaged. Nor can the interpretation of the material word depend on the possibility of difficulties in administration. On any view, such difficulties may arise. Reference was made to a series of parallel benefits or exemptions under the Finance Act, 1900, s. 14, which was made mandatory instead of discretionary and was otherwise extended by the Finance Act, 1924, s. 38, and by later Acts. These Acts, the language of which is different from the Act of 1894, do not supersede the effect of that Act. A claimant has an option. The Crown in the present case offered to the appellants the lesser benefits under the Finance Act, 1924, but they claim that they are entitled to the full benefits under the Act of 1894, and I think they are right. I would allow the appeal.

H. L. (Sc.)

1944

BLYTH
v.
LORD
ADVOCATE.

LORD SIMONDS. My Lords, the manner in which Major Frederick Donald Mirrielees met his death on August 17, 1940, the status of the Home Guard, then known as the Local Defence Volunteers, in which he held an appointment, and the relevant statutory rules and orders and the Army Council Instructions thereby authorized have already been stated beyond need of my recapitulation. The question is whether the estate of the deceased is wholly exempt from estate duty, and the answer to this question depends on the applicability to him of the provisions of s. 8, sub-s. 1, of the Finance Act, 1894. That sub-section makes applicable to estate duty the then existing law and practice in regard to (among other duties) probate duty for the purpose of " the exemption of the property " of common seamen, marines or soldiers who are slain or die " in the service of Her Majesty." If the deceased satisfied this description his estate is wholly exempt from estate duty. If he did not, then he is entitled only to the limited relief provided by s. 38 of the Finance Act, 1924. As to this no question arises. The words that I have cited from the Finance Act, 1894, are taken from the Stamp Act, 1815, which exempted from all stamp duties "probate of will . . . . and inventory of the " effects of any common seamen, marine or soldier who shall be " slain or die in the service of His Majesty, his heirs or successors." Their genesis can be traced back through intervening statutes to the Stamp Act, 1694. This appears to be the first English statute in which these or very similar words are to be found but they appear in earlier Acts of the Scottish Parliament.

The Second Division of the Court of Session has held by a majority (Lord Mackay dissenting), affirming a decision of the Lord Ordinary, that the estate of the deceased is not entitled to exemption, finding a solution to the question in a supposed legislative nomenclature which confined the use of the word " soldier " to the regular armed forces of the Crown, but it is clear, and it has, indeed, been admitted by counsel for the Crown on this appeal, that this view cannot be maintained in the light of the further researches that have been made into the relevant legislation. Therefore, I do not deem it necessary to deal with this aspect of the case. Before your Lordships the substantial argument on behalf of the Crown has been that a distinction must be made betwen so-called whole-time soldiers and so-called part-time soldiers and that it is only to the former that the sub-section gives exemption. Into this category, as I understand the argument of the Attorney-General, fall, not only the regular forces of the Crown, but also the territorial forces after their embodiment and the Home Guard too after they have been mustered to meet actual or threatened invasion. Into the category of part-time soldiers fall the Home Guard during the periods of intermittent training and service. The grounds of this distinction are said to lie, first, in the nature of the Act in which the words are found, and, secondly, in a consideration of all the relevant words in their context. I do not find it possible to derive any assistance from the nature of the Act. It is a taxing Act which provides for exemption from taxation in certain cases, and it appears to me to be useless to speculate whether the purpose of the exemption was one that should lead to the widening or the narrowing of its ambit.

It is in the second branch of the argument that I have felt some difficulty—a difficulty of the sort that is apt to arise in the construction and application of a statute or other instrument where an event has happened not contemplated by its authors. The Home Guard in some respects resembles the general levy which from Saxon times was raised to resist the threat of invasion, but, whatever may have been in men's minds and memories in 1694, it is not easy to suppose that in 1894 such a body was in the contemplation of the Parliament which passed the Finance Act of that year. None the less, if the words fit the case, it is immaterial that the section has an unforeseen application. So I take the whole phrase "common "seamen marines or soldiers who are slain or die in the service "of Her Majesty" and ask whether it is applicable only to the whole-time soldier to the exclusion of the man who pursues his ordinary avocation during part of his time but during other part of it is a soldier in the service of His Majesty and in that service dies. It has been contended on behalf of the Crown that, in the construction of this phrase, the words "in the "service of Her Majesty" must be given what has been called a temporal rather than a causal connexion, that is to say, the death must take place during the period of service. If it takes place during that period, it matters not what the cause of death may be. The alternative view is rejected, that the death must be attributable to service and that, if it is so attributable, it matters not when it takes place. Without expressing any final view on the point, I will assume this contention to be sound. If so, the sub-section applies only to the man of whom it can be predicated that, being a soldier in the service of His Majesty, he dies during his period of service. The question, then, is whether the phrase so interpreted covers the case of such a part-time soldier as I have described. The strength of the Crown's contention lies, I think, in the appeal to the popular use of the word "soldier." Could it, it is asked, be said of a man serving in the Home Guard, at any rate before muster, that he is a soldier in the service of His Majesty? And it is answered: "No, he would "be described as a lawyer, a dentist, or as the case might be. "He would not be called a soldier when he was in the Home "Guard nor an old soldier when he had left it."

I have come with some hesitation to the conclusion that this argument is unsound. It is clearly much weakened by the admission, which the Attorney-General was constrained to make, that a member of the territorial forces after embodiment and a member of the Home Guard after muster would come within the exemption. For, if so, the test of popular description becomes clearly inadequate. It is too great a refinement to suppose that a Home Guard in training before muster would be described as a dentist but after muster as a soldier. Perhaps the solution can best be found in this, that the popular use of the word "soldier" will naturally not extend to a type of military service which is novel and unfamiliar, but, nevertheless, if it is military service having the attributes which the word "soldier" connotes, then, in the absence of some context which excludes it, it must be included in that word. I think that the service of the Home Guard satisfies this test. There is no context to exclude him. His service is military. He is a member of the armed forces of the Crown. He is subject to military law. It is, I think, etymology notwithstanding, irrelevant whether he is unpaid or, a mercenary, "saves the "sum of things for pay." The same proposition may be stated somewhat differently. A privilege conferred or a burden imposed by Act of Parliament on a certain class of persons must be referable to some characteristic which that class bears. If that characteristic is the carrying on of some profession, it may well be that normally it is a whole-time profession, but prima facie it cannot be a condition of the privilege or the burden applying that it should be so, for it is in respect of the carrying on of the profession that the relevant provision has been made, certain acts producing certain consequences, whether those acts form the single avocation of the actor or an interlude in other activities. Thus, a moneylender in respect of his moneylending business is subject to certain statutory obligations which he cannot escape by saying that he is only a part-time moneylender and that for the rest he carries on some other business. It is irrelevant whether the acts, by the doing of which a man satisfies a certain description, are continuous or intermittent. When he is doing those acts, he does satisfy the description and qualifies for any privilege which Parliament may grant. So, here, it does not matter whether the deceased was something other than a soldier when he was not on duty as a Home Guard. When he was on duty he was a soldier, and on that duty he died. It is, in my opinion, at that moment of time that it must be asked of him whether he was a soldier. If he was, then it is irrelevant that at other times he followed some other pursuit, even though he so predominantly followed it that he would generally and popularly have been described, not as a soldier, but by reference to that other pursuit.

I do not ignore that the deceased, in order to obtain exemption under the section, must satisfy the description not only of a soldier but also of a " common " soldier. That epithet has generally fallen into disuse in relation to any part of the army, but I have no doubt that it was originally intended to distinguish the ordinary members of the army from those of a certain rank. It appears that in practice a somewhat arbitrary line has been drawn and that any soldier below the rank of sergeant has been treated for the purpose of the section as a " common " soldier, but in any case I see no reason for saying that it is adapted to distinguish a soldier in the regular forces of the Crown from a soldier in any other of His Majesty's forces. If a man is a soldier, he is a " common " soldier in whatever force he may be serving unless he has some rank. The Home Guard was a body so constituted at the death of the deceased that, though there were de facto leaders, there was equality of status without rank or privilege. Appointments there were. The deceased held the appointment of company commander, but it was an appointment, not a rank. He held no commission, and could be discharged or resign in the same way as any other member of the Home Guard. Nor had he any of the powers of summary punishment or discipline which are usually associated with higher rank in an army. He must, therefore, in my opinion, be regarded not only as a soldier, but also as a common soldier for the purpose of the section. My Lords, I concur in the motion that the appeal should be allowed.

Solicitors for appellants: *Gregory, Rowcliffe & Co.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

GOONESINHA . . . . APPELLANT ; J. C.

AND 1944*

Dec. 20.

HON. C. L. DE KRETSER . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Election court—Jurisdiction—Extension of Supreme Court—Certiorari—Ceylon (State Council Elections) Order-in-Council, 1931 (*as amended to* 1935), *arts.* 75, 76 ; *sch. VI., rr.* 4, 29, 37.

Cognizance of election petitions is a special jurisdiction conferred on the Supreme Court of Ceylon by the Ceylon (State Council Elections) Order-in-Council, 1931. It is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court, and consequently certiorari cannot be granted by that court to bring up any order made by the Election court or judge in the exercise of that jurisdiction.

Reg. v. *Judges and Justices of the Central Criminal Court* (1883) 11 Q. B. D. 479, referred to.

Judgment of the Supreme Court of Ceylon (1942) 43 C. N. L. R. 337, affirmed.

APPEAL (No. 51 of 1943) from a judgment of the Chief Justice of the Supreme Court of Ceylon (June 1, 1942) whereby he refused to issue a writ of certiotari to quash an order made by the Election judge (March 18, 1942).

The main question involved in this appeal related to the power of the Supreme Court of Ceylon to issue a writ of certiorari directed to the Election judge or court. The following facts are taken from the judgment of the Judicial Committee : On April 26, 1941, a by-election was held for the return of a member of the Ceylon State Council for the electorate of Colombo north. The successful candidate was a Mr. de Silva, and the present appellant, who took an active part in political and municipal affairs in Colombo, was one of his prominent supporters. Subsequently, a petition was presented by the unsuccessful candidate to the Supreme Court of Ceylon, under the Ceylon (State Council Elections) Order-in-Council, 1931, asking that the election might be declared void, and alleging general intimidation, treating, and undue influence. In two instances undue influence on electors to cause them to vote for Mr. de Silva was alleged to have been exercised by the appellant, and in his judgment, which was delivered on December 22, 1941, the Election judge, who was the present respondent, found both those charges proved. The learned judge thereupon ordered that notice should at once be given to the appellant in terms of art. 79, sub-art. 2, of the Order-in-Council to show cause why he should not be reported to His Excellency the Governor as having been guilty of a corrupt practice. The offence of undue influence, as defined by art. 53 of the Order-in-Council was, by art. 55, declared to be a corrupt practice. The combined effect of art. 55, sub-art. 1, and art. 79, sub-art. 3, was that a person reported for a corrupt practice was rendered incapable of voting or being elected to the State Council for a period of seven years. The notice given to the appellant to show cause referred to one only of the cases found proved against him. On appearing to show cause the appellant, who had given evidence on the trial of the petition, desired to call nine witnesses, whose names he had previously given, with the object of proving that he was not guilty of the offence specified in the notice which the Election judge had found proved. The learned judge refused to hear those witnesses, on the ground that he could not be asked to reverse the findings which he had already made on the trial of the petition. He held that as by art. 78 of the Order-in-Council his determination as to the validity of the election was final, it followed that his finding that a person had committed a corrupt or illegal practice must necessarily be final also, and he reported the appellant. The appellant then moved the Supreme Court for a mandate in the nature of a writ of certiorari to bring up what was called the Order—the report—by which he was reported and have it quashed. On June 1, 1942, the Chief Justice of Ceylon delivered judgment refusing to issue the mandate, holding that the Election court in Ceylon was a superior court to which no writ in the nature of certiorari would lie. Against his refusal the Supreme Court gave the appellant leave to appeal to His Majesty in Council.

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* *Present :* LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD GODDARD, SIR MADHAVAN NAIR and SIR JOHN BEAUMONT.

1944. Dec. 4, 5. *Pritt K.C.*, *Subba Row* and *Ralph Parikh* for the appellant. The Supreme Court refused the writ on the ground that the Election court or judge is in fact part of the Supreme Court itself, and that—what is a familiar

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doctrine—the Supreme Court cannot issue certiorari to a part of itself. Nowhere in the Courts Ordinance of Ceylon, c. 6 of the Revised Legislative Enactments of Ceylon, 1938, or in the Order-in-Council, 1931, does it say that the Election judge shall be sitting *as part of* the Supreme Court. He is to certify and report ; he doesn't give a judgment in the accepted sense. His is not the ordinary work of the Supreme Court. The real answer to art. 76 of the Order-in-Council, which provides that an election petition may be presented to the Supreme Court by a voter or candidate at the election, is that there are so many other indications that the Election judge is not a judge of the Supreme Court—he is to be furnished almost step by step with this, that, and the other jurisdiction, to enable him to get on with his work. The Supreme Court's jurisdiction is expressly set out in s. 19 of the Courts Ordinance, and there is nothing there to indicate any jurisdiction to try either an election petition or any other civil first issue. Article 75, sub-art. 1, of the Order-in-Council does not say that election petitions shall be tried by the Supreme Court, but by the Chief Justice as a persona designata by the Order-in-Council, or any other judge. By art. 75, sub-art. 3, the Election judge is given certain powers for the purposes of summoning witnesses, because, not being the Supreme Court, he has no authority. In arts. 78 and 79 there is express authority to make certain determinations and reports, and he is treated there, as everywhere else, as somebody who starts life with no authority and jurisdiction at all, and is to be given it step by step. The English authorities do not hinder or help on the question whether the Election judge is part of the Supreme Court : *Marshall* v. *James* (1). Of the Ceylon cases which touch on the matter *Tillekewardene* v. *Obeyesekere* (2) might be said to be obiter dictum, while *Wijeyesekere* v. *Corea* (3) can be said to be a decision in the appellant's favour—the judge there arrived at his decision by deciding that the Election court was not part of the Supreme Court. [Reference was also made to ss. 5 and 11 of the Parliamentary Elections Act, 1868 (31 & 32 Vict., c. 125).] The mere fact that a petition is to be presented to a court does not mean that it is to be tried by that court. If a court has a limited jurisdiction in the sense that it only covers certain matters, it is an inferior court. The Election court is to be treated as an inferior court for the purposes of certiorari: *Colonial Bank of Australasia* v. *Willan* (1).

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(1) (1874) L. R. 9 C. P. 702, 718–9.

(2) (1931) 33 N. L. R. 193, 197.

(3) (1931) 33 N. L. R. 349.

Before a person is reported under art. 79, sub-art. 2, of the Order-in-Council the Election judge should give him an opportunity of being heard and calling evidence. When, in the course of the hearing, the judge sees a development coming forward which involves a third party he must then and there, or at some convenient time before he makes his certificate and report, give that person an opportunity of being heard. That construction admittedly involves two trials together, but that is quite possible—it is really all one trial.

Subba Row followed, and referred to *Municipal Corporation of Rangoon* v. *M. A. Shakur* (2). If it was intended to invest the Supreme Court of Ceylon as such with this particular jurisdiction it would have been so stated in clear words.

Gahan for the respondent. An Election judge is a judge of a superior court of record, whether or not a branch of the Supreme Court, to whom no mandate in the nature of a writ of certiorari can be lawfully directed. Articles 75 and 76 of the Order-in-Council of 1931 can only be interpreted as showing that the jurisdiction to deal with election petitions is in the Supreme Court, and that view is supported by the rules of procedure in sch. VI. of the Order-in-Council: rr. 4, 29, 37.

Pritt K.C. replied.

Dec. 20. The judgment of their Lordships was delivered by LORD GODDARD, who stated the facts set out above and continued: Their Lordships are of opinion that the judgment of the learned Chief Justice is plainly right. By art. 75 of the Order-in-Council every election petition is to be tried by the Chief Justice or a judge of the Supreme Court nominated by him, and the Chief Justice or the nominated judge are referred to in the Order as the Election judge. By cl. 5 of this article it is provided that, unless otherwise ordered by the Chief Justice all interlocutory matters in connexion with a petition may be dealt with and decided by any judge of the Supreme Court. Article 76 provides that an election petition may be presented to the Supreme Court by one or more of certain classes of persons. These two sections alone would appear to show quite clearly that an election petition is a proceeding in the Supreme Court, and a reference to the rules of procedure which are enacted in sch. VI. to the Order

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(1) (1874) L. R. 5 P. C. 417, 440.

(2) (1925) I. L. R. 3 R. 560, 576.

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confirms, if confirmation were necessary, this view. Rule 4 gives the form a petition is to take, and its heading is "In the "Supreme Court of Ceylon." Rule 29 deals with the withdrawal of a petition, which cannot be done without the leave of the judge, that is, the Election judge. Sub-rule 2 of this rule prescribes the affidavits which are to be filed on such an application, but provides that a judge of the Supreme Court, and not only the Election judge, may on special grounds dispense with the affidavit of any particular person. Again, r. 37 provides that the petition is not to abate because a respondent dies, resigns, or gives notice to the court that he does not intend to oppose the petition, and provision is made as to how and when notice is to be given to the court. While the ordinance constituting the Supreme Court does not confer on it original, but only appellate, jurisdiction in civil cases, their Lordships are of opinion that cognizance of election petitions is a special jurisdiction conferred on the Supreme Court by the Order-in-Council, and that is abundantly clear from the provisions to which they have referred. It is well settled, and counsel did not seek to argue to the contrary, that a court having jurisdiction to issue a writ of certiorari will not, and cannot, issue it to bring up an order made by a judge of that court. Nor will a superior court issue the writ directed to another superior court—*Reg.* v. *Justices of the Central Criminal Court* (1)—and if the Election judge is to be regarded as a special or independent tribunal his court would, in their Lordships' opinion, be a superior court. Considering that the court is held before a judge of the Supreme Court from whose decision there is no appeal, it could not be otherwise. But their Lordships are of opinion that the true view is that cognizance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court, and consequently certiorari cannot be granted to bring up any order made in the exercise of that jurisdiction. As the appellant's motion was rightly rejected it is unnecessary to consider the other matters raised in the appeal, and their Lordships will humbly advise His Majesty that it should be dismissed, with costs.

Solicitors for appellant: *Hy. S. L. Polak & Co.*
Solicitors for respondent: *Burchells.*

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(1) (1883) 11 Q. B. D. 479.

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June 26, 27; *Oct.* 16, 17, 18, 19, 23; *Dec.* 8.

ARISTOC LIMITED . . . . . APPELLANTS

AND

RYSTA LIMITED . . . . . RESPONDENTS.

Trade mark—Application to register mark in respect of stockings—Previous use by applicants for stocking repair service—Whether use as trade mark—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 11, 12, 68, *sub.-s.* 1.

A mark used on or in relation to goods so as to indicate the fact that they have been repaired by a particular person is not a " trade mark " within the definition in s. 68, sub-s. 1, of the Trade Marks Act, 1938, and accordingly is not registerable under the provisions of the Act.

Decision of the Court of Appeal (1943) (60 R. P. C. 87), reversed.

APPEAL from the Court of Appeal.

The facts stated by VISCOUNT MAUGHAM and LORD MACMILLAN were as follows: From 1929 the respondents were engaged in carrying on a highly successful business as repairers of women's silk stockings. They were the owners of an undisclosed process for effecting these repairs, which were said to be invisible, by a system of re-weaving or re-knitting, so as to catch up the broken threads which had caused ladders in the stockings. To this process they gave the name " Rysta " because, it was stated, it had been devised by two persons whose Christian names were Rydall and Stanley. Under this name the respondents' process acquired a wide reputation and upwards of 16 million pairs of silk stockings, sent to them either directly by members of the public or by other means, were repaired by them. They did not in general deal directly with members of the public. Laundries, cleaning establishments and retail stores were accustomed to accept from ladies their stockings which had laddered. These stockings were then forwarded to the respondents who carried out the repairs and returned them to the laundries or other establishments, with a printed ticket or label attached bearing words indicating that they had been repaired by the " genuine Rysta guaranteed " hosiery repair process," the word " Rysta " appearing in bold type. The laundries or other establishments then returned the repaired stockings to the owner and accepted payment for the repair work done on them. On November 10, 1938, at which date they neither made nor sold any stockings, the respondents filed an application for registration in Part A of the Register of the word " Rysta." The Trade Marks Act, 1938, prescribed in s. 3 that " a trade mark must be registered " in respect of particular goods or classes of goods," and the forms of application for registration, prescribed by the Board of Trade with statutory effect under s. 40, required the applicant to specify the goods in respect of which he proposed to use the trade mark for which he sought registration : (Trade Marks Rules, 1938 (St. R. & O., 1938, No. 661), r. 21 and sch. II. The respondents filled up this part of the form (Textile No. 2) by specifying registration " in class 25 in " respect of stockings and reweaving repairs effected thereto," and the mark was stated to be used by the respondents, the words in the printed form stating that it was " proposed to " be used " having been struck out. On December 2, 1938, the Registrar, or the Assistant Comptroller acting on his behalf, addressed a letter to the respondents stating : " It will " eventually be necessary for you to alter the specification " of goods to ' stockings.' Registration cannot be obtained " for a ' repairing system or service '." The alteration was accordingly made and the words " and re-weaving repairs " effected thereto " were deleted leaving the application as one for goods described simply as " stockings." No alteration was made in the statement that the mark sought to be registered was a mark already in use. The appellants for many years had carried on business as manufacturers of and dealers in women's silk stockings, under the registered trade mark " Aristoc." They adopted the invented word " Aristoc " as a trade mark in 1923, and had sold silk stockings of their manufacture throughout the United Kingdom to the value of four million pounds sterling. They were the registered proprietors of some twenty-four registered trade marks consisting of the word " Aristoc " alone or having that word as the most important and prominent feature. On November 29, 1938, they gave notice of opposition to the respondents' application, on the ground that the word " Rysta " was calculated to deceive and lead to confusion with the appellants' registered trade mark " Aristoc," though it was not suggested that any connexion with the word " Aristoc " was intended. They also asserted that the respondents' use of the word " Rysta " on stockings to indicate that the stockings had been repaired by them was not user of the word as a trade mark, and that accordingly it could not be registered. The respondents put in a counter-statement dated December 18, 1938, in which after stating that they had been engaged since the year 1930 in the business of repairing stockings by the " Rysta " process, that hundreds of thousands of stockings had been repaired by that process annually, and that they had circulated in a year no fewer than four million forms advertising the process, they continued as follows : " 3. The " [respondents] intend to offer for sale stockings bearing the " brand name ' Rysta ' and have applied for registration of " the said mark which they desire to use to exploit the " goodwill built up by them in the said mark in connexion " with stockings over the long period of trading by them " under the said mark in connexion with their stocking repair " business." They avowed throughout that if their application was granted and the word " Rysta " was registered as a trade mark for stockings, they would continue to use the word on stockings which they had only repaired. The genuineness of the respondents' intention to enter on the business of dealing in stockings as manufacturers or vendors was not challenged, and when the application came before the Assistant Comptroller, acting for the Registrar, there was no cross-examination or evidence on this question. On July 28, 1941, the Assistant Comptroller issued his decision authorizing the application to proceed. There was no evidence before the Assistant Comptroller as to the mode of pronunciation generally adopted by purchasers of or dealers in ladies' stockings of the words " Rysta " and " Aristoc," but on appeal from his decision evidence was filed which established the fact that large numbers of the public pronounced the word " Rysta " to rhyme with vista ; the evidence also proved that the appellants' mark " Aristoc " was pronounced by many persons with the emphasis on the middle syllable. On May 15, 1942, Farwell J. discharged the order of the Assistant Comptroller and directed the Registrar not to proceed with the registration. On March 9, 1943, the Court of Appeal (Lord Greene M.R. and MacKinnon L.J., Luxmoore L.J. dissenting) reversed the order of Farwell J., holding that the registration should be allowed. The appellants appealed to the House of Lords.

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* *Present:* VISCOUNT MAUGHAM, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT and LORD SIMONDS.

Swan K.C. and *J. Mould* for the appellants. In the definition of " trade mark " in s. 68, sub-s. 1, of the Trade

Marks Act, 1938, the words "connexion in the course of "trade" mean a connexion arising from selling or otherwise trading in the goods to which the mark is applied and do not refer to any other kind of connexion. It is a connexion between the goods and the person entitled to use the work. Three considerations support this conclusion: (*a*) Only if so interpreted are the words "connexion in the course of trade" consistent with the other sections of the Act, in which it is clear that the only use of a trade mark which the Act contemplates is use by selling or otherwise trading in the goods to which the mark is applied: see ss. 26, 31, and 68. (*b*) Only if the words are so interpreted is there any reason for treating the proprietor of a certification mark as a person having no connexion in the course of trade with the goods he certifies: see ss. 68 and 15, sub-s. 1 (*a*), and contrast s. 37, sub-s. 5 (*a*) and (*b*), with s. 4, sub-s. 3 (*a*) and (*b*). (*c*) The signification and function of a trade mark in the past have always been to denote the origin of the goods to which the mark is applied, and the Act of 1938 gives no clear indication of any intention to depart from or alter this fundamental signification of a trade mark and principle of trade mark law: see Maxwell on Interpretation of Statutes, 8th ed., p. 73, quoted by MacKinnon L.J. in *Bismag, Ld.* v. *Amblins* (*Chemists*), *Ld.* (1). In the Act of 1938 there is no departure from the fundamental principle that the function of a trade mark is to indicate origin, the trade source from which the goods come, or the trade hands through which they pass on the way to the market: *In re Powell's Trade Mark* (2). A mark may be used in the course of trade in various ways. (*a*) A trader may put a mark on goods so as to indicate to the purchaser that he takes responsibility for their quality, i.e., that he has given them some character either by manufacture or selection; that is the true use of a trade mark. (*b*) A person who carries on some trade (e.g., that of a moneylender) in the course of which he uses certain goods (e.g., stationery, typewriters or motor-cars) may put a distinctive mark on them to indicate that they are his property; this is not within the trade mark definition, as the goods are not for sale. (*c*) A person who performs an occasional service in relation to goods already marketed and now private property (e.g., washing or cleaning clothes or tuning pianos) may use a mark, but this is not a trade mark use. The true scope of a trade mark appears

(1) [1940] Ch. 667, 687.

(2) [1893] 2 Ch. 388, 403, 404.

from the definition in s. 3 of the Trade Marks Act, 1905, which summed up the existing case law on the subject: *Major Brothers* v. *Franklin & Son* (1). The Act of 1938 did not change, by the definition in s. 68, sub-s. 1, the nature and function of a trade mark: *Bismag, Ld.* v. *Amblins* (*Chemists*), *Ld.* (2). If by the words "connexion in the course of trade" it had been intended to widen the meaning of "trade mark" and its function more explicit language would have been used. The words are limited to trading in the goods bearing the mark. The respondents' application was on the face of it an application to register "Rysta" as a trade mark for repairing stockings, and at the date of the application it was the respondents' only "definite and present intention": see *In re John Batt & Co.'s Trade Marks* (3) and s. 26, sub-s. 1, of the Act of 1938. It is still their avowed intention. They are seeking protection for the continuation of the use of the mark on stockings repaired by them. The connexion which this repair of stockings involves is not "a connexion in the course of "trade" within the meaning of s. 68, sub-s. 1, in that the repairer of stockings does not sell or otherwise trade in the stockings so repaired, which is the only form of connexion in the course of trade which the statute recognizes as constituting a trade mark. No purpose is served by putting a trade mark on goods after they have been mended, cleaned or washed, for they are not articles of trade. A piano tuner could not register a trade mark in respect of the services he renders. There cannot be a trade mark in respect of a process applied to goods after they have reached the hands of the public. The case is, of course, different when the process involves the sale of some article, as fixing rubber soles to shoes or putting a new tread on a tyre. If a trade mark is still, as it always has been, an indication of origin, the marking of stockings which are not the merchandise of the respondents, but only repaired by them, is putting on the stockings a false indication of origin. Stockings bearing such a false indication of origin are bound, sooner or later, to cause deception and confusion. Accordingly registration should be refused and the position of the respondents is not improved by their statement of intention to use the mark for purposes which the law sanctions. The unqualified use of this mark would be improper and, since a qualification cannot be imposed, it

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(1) [1908] 1 K. B. 712, 717.
(2) [1940] Ch. 667, 692.
(3) [1898] 2 Ch. 432, 440.

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should not be registered. To use the same mark on stockings which are the merchandise of the respondents and on stockings which are not their merchandise but the merchandise of some other trader and only repaired by the respondents, is bound to lead to deception and confusion, whether a trade mark for repair is properly registerable or not, and accordingly is unlawful by virtue of s. 11 of the Act of 1938 : see *Bass, Ratcliff & Gretton, Ld.* v. *Nicholson & Sons, Ld.* (1) and *In re Boots' Pure Drug Co., Ld.'s Trade Mark* (2). The onus of proving that such deception or confusion will not occur is on the respondents, and they have not discharged that onus. The only application of s. 62 of the Act is to marks already on the register. Moreover it is not intended to save marks from invalidation when it appears likely that deception or confusion will in fact result from the changed use or different form of connexion. The verbal similarity, especially in speech, between " Rysta " and " Aristoc," which latter word has long been continuously and widely used and has come to indicate to members of the trade and public stockings of the appellants' manufacture or merchandise, is bound to lead to serious confusion within s. 12 of the Act of 1938, when both these words are used in connexion with stockings. If every time one of the appellants' stockings was repaired by the respondents they were entitled to put on it their mark " Rysta," the public could never know which of the two had made the stocking. Many people besides the owners might see the repaired stockings marked " Rysta." Registration ought to be refused if the likelihood of confusion or deception remains in dubio : see *Eno* v. *Dunn* (3) per Lord Watson. Registration of a trade mark confers on the owner a certain immunity (s. 4, sub-s. 4, of the Act of 1938). Once the trade mark " Rysta " was on the register the appellants could not sue for any infringement of their mark without applying to expunge it. [They referred to *Robinson* v. *Finlay* (4) ; *In re Colgate & Co.'s Application* (5) ; *In re Hotpoint Electric Heating Co.* (6) ; *Charles Goodall & Son, Ld.* v. *John Waddington, Ld.* (7) ; *George Banham & Co., Ld.* v. *F. Reddaway & Co., Ld.* (8) ; *McDowell* v. *Standard Oil Co. (New Jersey)* (9) ; *Lacteosote, Ld.* v. *Alberman* (10) ; *Saville*

(1) [1932] A. C. 130, 151.
(2) [1938] Ch. 54.
(3) (1890) 15 App. Cas. 252, 257.
(4) (1878) 9 Ch. D. 487, 501.
(5) (1913) 29 T. L. R. 326 ; 30 R. P. C. 262.
(6) (1921) 38 R. P. C. 63.
(7) (1924) 41 R. P. C. 658, 665.
(8) [1927] A. C. 406.
(9) [1927] A. C. 632.
(10) [1927] 2 Ch. 117.

Perfumery, Ld. v. *June Perfect, Ld.* (1); Sebastian on Trade Marks (5th ed.), pp. 2, 17, 33; Kerly on Trade Marks (6th ed.), 27, 31, 35, 230.]

Burrell K.C. and *Lloyd-Jacob* for the respondents. The mark applied for is a good and registerable trade mark. At the date of the application the respondents used it and had a bona fide intention to use it as a trade mark. Although it may not be possible to get a trade mark registered for repair of goods yet if the trade mark is registered in respect of a certain class of goods that registration confers the right to use it both on stockings made by the respondents and on stockings which they have merely repaired. Manufacturers of pipes and of woollen garments sometimes undertake repair as well as sale. There may be a service of dyeing and re-dyeing the same goods, the sequence of events from dyer to ultimate customer being identical. If in the present case the application had originally been in respect of "stockings" and this had subsequently been altered to "repaired stockings," it might have been suggested that registration should be refused because the respondents had restricted the application of the mark to a use which was not a trade mark use; but the facts are just the opposite. So long as the respondents intend to use the mark as a trade mark that is sufficient, and it is irrelevant whether they have so used the mark previously or not. In the application form they were required to indicate whether the mark was already in use, but this was irrelevant to the point whether the mark came within the definition of a trade mark in s. 68, sub-s. 1, of the Act of 1938. The purpose and effect of the requirement was to inform the Registrar whether there would arise any question of distinctiveness under s. 9, or of concurrent use under s. 12, sub-s. 2. In the present case past user is irrelevant because the right obtained by the registration of a trade mark is essentially not the right to use it but the right to prevent anyone else from using it. Though for the purposes of this application it is immaterial whether use of the mark in relation to repairs to goods after they have reached the public's hands is or is not a trade mark use, such a use is actually a trade mark use. It is true that a trade mark cannot be registered in respect of a process or operation, but it can be registered in respect of goods to which such a process has been applied. There is no complete definition of a trade mark: Sebastian on Trade Marks (5th ed.),

(1) (1939) 58 R. P. C. 147.

p. 2; Kerly on Trade Marks (6th ed.), p. 27. The expression "trade" has a very wide orbit which includes such activities as an insurance company's business. The conception of what constitutes a trade mark must change as trading develops and the sphere of trading activities is enlarged. Various activities such as dyeing, cleaning, laundry and valeting services formerly rendered in the home are now the subject of trades. These only differ from manufacturing in that the raw materials of the trade are manufactured articles already belonging to other persons. Indeed, in the case of the respondents' trade the re-weaving does involve manufacturing part of the repaired stocking by a machine operated process, so that the stocking has a characteristic qua manufacture which it had not before. The development of trade has brought into common use by the public more and more complicated objects, such as radio sets, which require servicing and repairs, and those who perform them are entitled to crystallize their goodwill round a mark. Such traders have a market consisting of their actual or potential customers. "Pullars" and "Key-Flats" are examples of this description of trade. Their mark would have been registerable under the Trade Marks Act, 1905, falling within the definition in s. 3, to which a wide meaning was attributed in *Major Brothers* v. *Franklin & Son* (1). Official Ruling 1928 C, the case of the *Bradford Dyers Association, Ld.* (2) carried the matter one stage further because in that case the goods dealt with were the goods of their customers. In that case the applicants did not themselves actually sell cloth bearing their mark, but received cloth from other firms for the purpose of dyeing it, and applied the mark to that cloth to indicate that it had been dyed and finished by them. So far as regarded the trade mark character of the application of their mark, it was irrelevant whether or not it remained on the cloth after it had passed out of the hands of their customers. The present application is the logical extension of that case. The respondents' trade does not depend on the fortuitous circumstance of whose goods they are applying their mark to. The words "dealing with" in the definition in s. 3 of the Act of 1905 have a sufficiently wide meaning to cover any operation on the goods by a trader even after they have come into the hands of a member of the public, though the effect of that operation may be slight, and however little the mark

(1) [1908] 1 K. B. 712. (2) (1928) 45 R. P. C. vi.

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may indicate the origin, character or quality of the goods. But in any event, the definition in s. 68, sub-s. 1, of the Act of 1938 covers the case of a person who carries on the business of cleaning objects. That is within the words "connexion "in the course of trade," which must be given a wide meaning. In the definition the legislature was not seeking to express exhaustively what is a "trading activity." The Act contained so many revolutionary provisions dealing with trade marks that it would be very dangerous to attempt to construe it so as to make it consistent with all pre-existing notions. Now under the Act whenever there is a business concerned in goods and a mark is used to distinguish those goods from the goods of other traders that is sufficient to constitute it a proper trade mark. [They referred to *Bass, Ratcliff & Gretton, Ld.* v. *Nicholson & Sons, Ld.* (1) and *Bismag, Ld.,* v. *Amblins (Chemists), Ld.* (2).] The appellants argued that the use of the respondents' mark would lead to confusion and deception, but it does not offend against the provisions of s. 11 or s. 12 of the Act of 1938. As regards similarity between "Rysta" and "Aristoc" the possibility of confusion is only phonetic and that is remote. The court requires evidence that there is a real perceptible danger of confusion. In this connexion it should be remembered that confusion and deception are not synonymous with mistake. Thus "black and white" will mean different things in relation to whiskey and cigarettes; it may also refer to drawing or to writing; but that does not mean that it is unsuitable for a trade mark. Under s. 11 the question is whether if the mark is used as a trade mark it will be calculated to deceive: see *In re Pianotist Co., Ld.'s Application* (3) and *Imperial Tobacco Company of Great Britain and Ireland* v. *Pasquali* (4). The court on this point is limited to considering the results if the mark were used normally, and in a manner which was properly user as a trade mark. If user in connexion with repairs is user as a trade mark then every trade mark on the register can be so used. If it is not user as a trade mark then any confusion arising in the case of dual user for repair and for sale does not come within s. 11, since the deception would not arise from user as a trade mark. But there has been no confusion between new stockings and repaired stockings during the ten years

(1) [1932] A. C. 130.

(2[[1940] Ch. 667, 678.

(3) (1906) 23 R. P. C. 274, 277.

(4) [1918] 2 Ch. 207, 228, 229, 231.

that "Rysta" has been used to indicate a repaired stocking. It was not suggested that the label used by the respondents caused, or could cause, confusion. The owners of the repaired stockings are not confused, and before the court will assume that second-hand stockings are dealt in it will require some evidence. [They referred to *In re Hotpoint Electric Heating Co.* (1); *Lacteosote, Ld.* v. *Alberman* (2) and *McDowell* v. *Standard Oil Co.* (*New Jersey*) (3).]

Sir David Maxwell Fyfe S.-G. and *Danckwerts* for the Registrar of Trade Marks. The Registrar does not take any part on the issue of fact. His interest is simply the public interest that the law should be laid down clearly. User by way of repair after the goods have reached the hands of the public is actually user as a trade mark, even though the goods are already the subject of an existing trade mark indicating origin. An analysis of the definition in s. 68, sub-s. 1, of the Act of 1938 shows that it is extending at all points. (*a*) The words "in relation to goods" are used instead of the words "upon or in connexion with goods" in s. 3 of the Act of 1905, and s. 68, sub-s. 2, makes it clear that the relation need not be physical, as might have been thought in the case of the words "in connexion with": see Bray and Underhay on the Trade Marks Act, 1938, p. 63, and the Goschen Report of 1934 (Cmd. 4568), p. 8. (*b*) The addition of the words "so as to "indicate" in s. 68, sub-s. 1, gives statutory effect to the non-necessity of intention as expressed by Lord Macmillan in *Bass, Ratcliff & Gretton, Ld.* v. *Nicholson & Sons, Ld.* (4). (*c*) The words "a connexion in the course of trade" is substituted in s. 68, sub-s. 1, of the Act of 1938, for the enumeration of activities in s. 3 of the Act of 1905, which was unduly restrictive: see p. 63 of the work of Bray and Underhay, and p. 9 of the Goschen Report. (*d*) The words "some person "having the right either as proprietor or as registered user to "use the mark" in s. 68, sub-s. 1, include under s. 28 the limited "permitted user" by someone other than the proprietor. It would be odd if the definition were extended at points (*a*), (*b*) and (*d*) but the amendments at (*c*) were merely drafting. It is permissible to look at the Goschen Report: see *Eastman Photographic Materials Co., Ld.* v. *Comptroller-General of Patents, Designs and Trade Marks* (5) and *Bismag, Ld.*

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(1) 38 R. P. C. 63.
(2) [1927] 2 Ch. 117.
(3) [1927] A. C. 632.
(4) [1932] A. C. 130, 154, 155.
(5) [1898] A. C. 571, 573–5.

v. *Amblins* (*Chemists*), *Ld.* (1). "Trade" is used in this connexion in a wide sense. The history of its legal definition begins with the meaning of an "art or mystery": see the definition in Stroud's Judicial Dictionary (2nd ed.). Next it means buying and selling: see *Grainger & Son* v. *Gough* (2) per Lord Davey. Next it receives the wider meaning of industry and manufacture: see *Commissioners of Taxation* v. *Kirk* (3). Manufacture was included in the 1905 definition of a trade mark. It is unlikely to be excluded from the new definition. The place of manufacture, the factory, has included the place where repairs are done at least since 1901, and this has been retained in the definition: see Factory and Workshop Act, 1901, s. 149; Rating and Valuation (Apportionment) Act, 1928, s. 3, sub-s. 2; Factories Act, 1937, s. 159, sub-s. 3. Well-known phrases including the word trade have taken on a wide meaning in every field: (*a*) "Trade or industry" coalesced in "trade dispute," which now embraces any dispute between employers and employed: see *National Association of Local Government Officers* v. *Bolton Corporation* (4); (*b*) "Trade "or business," the only business which may not be a trade is that of an investment company; (*c*) The expression "trade "union" includes employers' federations, e.g., the Motor Trade Association, which embraces those rendering service in connexion with motor cars; (*d*) "Restraint of trade" is a conception applicable in this country to such businesses as that of funeral furnishers. In the United States of America the Sherman Act, the Clayton Act and the Federal Trade Commission Act all cover the case of price fixing, etc., in the case of services. (*e*) "Trade" in the Merchandise Marks Act, 1887, comprises manufacture: see the definition of "trade description" in s. 1, sub-s. 3. As trade is receiving an extended meaning in so many fields, it would be wrong to give it a restricted meaning in the field of trade marks. In the definition in s. 68, sub-s. 1, "trade" is obviously used in its widest sense, because its scope must be wider than the common denominator of "manufacture, selection, certification, dealing "with or offering for sale" in s. 3 of the Act of 1905. The more mechanized the needs of life become, the more important become the repair services. The Registrar should follow trade usage: s. 49 of the Act of 1938. Important services

(1) [1940] Ch. 225, 232, 233, 667, 670.

(2) [1896] A. C. 325, 346.

(3) [1900] A. C. 588.

(4) [1943] A. C. 166.

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have already been granted trade marks and the practice is advantageous to the public interest. The words "in the "course of trade" in s. 68, means before the goods reach the consumer. The consumer has taken the place of the purchaser over a wide range of trades, e.g., in hiring, hire purchase and leasing. Consumption is the test by which one would reject the example drawn from the application of a mark to furniture in a moneylender's office. If one is bound to include cases of work done and materials supplied in trade mark user, the logical limit of the "course of trade" is before the altered goods reach the person for whom the work is done and the materials are supplied. In the case of repaired goods, the trade mark used in relation to them indicates origin because they may be said in that character to originate with the repairer. The appellant's argument on certification trade marks is not compelling. In *In re Union Nationale Inter-Syndicale de Marques Collectives' Application* (1) Lord Sterndale M.R. said that a certification mark is not a trade mark. Yet, although strictly in a different category, it has always been treated as one. It was, therefore, necessary in the Act to attract with certainty the provisions of the International Convention, e.g. as to priority. There is no real analogy between standardization and repair. The passages in the text-books relied on by the appellants are almost all based on *In re Powell's Trade Mark* (2) per Bowen L.J. and *Maxwell* v. *Hogg* (3) per Cairns L.J. quoting *McAndrew* v. *Bassett* (4). It may be said of all the dicta quoted, that in none of these cases did the present question arise. In none was the possibility of this kind of user before the judge. In none was the court directing its mind to this point. In none was the court considering the present law as set out in the new Act. If repair is a trade mark user the respondents would be, so far as user is concerned, protected by s. 62, which is, in effect, a proviso to s. 11. Farwell J. was in fact deciding that a repairing service is not a "connexion in the course of trade." Prevention of deception is the foundation of trade mark law, whether common law or statute law, the Merchandise Marks Act, 1887, or the action for deceit based on trespass on the case. A connexion in the course of trade cannot, per se, be deceptive, were it otherwise the qualification "non-deceptive" would have been necessary in the definition in s. 68, sub-s. 1, of the Act of 1938.

(1) [1922] 2 Ch. 653, 681, 682.
(2) [1893] 2 Ch. 388, 403, 404.
(3) (1867) L. R. 2 Ch. 307, 314.
(4) (1864) 4 De G. J. & S. 380.

By the judgment of Farwell J. the mark of a repairer on goods he has repaired subjects the public to deception by ambiguity, and therefore the registration of marks intended for that use is not now to be thought of. By the joint effect of ss. 9, 11, 12, sub-s. 1, and 68, sub-s. 1, a trade mark complying with ss. 9 and 11 (which operate on the mark and not on the use) is registerable to a person intending to use it to indicate any " connexion in the course of trade " between himself and the goods. Therefore it follows from the judgment that a repairing service is not a " connexion in the course of trade." It would also appear to be implicit in the judgment (*a*) that the addition of another " connexion in the course of trade " must cause confusion or deception and (*b*) that the possibility of another " connexion in the course of trade " will cause confusion whenever registration is granted. But the correct view is that registration in no way entitles a proprietor to use his mark in a deceptive way. Conversely, the mere fact that a mark might be dishonestly used is no ground for refusing registration. Although the bare mark is registerable it may well be necessary to add explanatory matter to avoid deception and action under s. 32, sub-s. 1: see *In re Kutnow's Trade Mark* (1) and *In re Lyle and Kinahan, Ld.'s Application* (2). The general answer to the appellant's case is that a trade mark is an alternative to a trader's name, used in relation to goods. Traders cannot be prevented from putting suitably their names or marks on goods they have repaired; refusal of trade mark registration will not stop them. By the method of marking they can distinguish, in their own interests, between their new goods and goods of their repair. Is it not, then, in the public interest to prevent confusion by giving rights to exclude use of their mark by others, whether for repaired or new goods? But if that view is not taken, then since one cannot tell by looking at a mark whether it is supported by a " connexion in the course of trade," that must be determined on the sub-character of the goods bearing it (e.g. whether they are *repaired* stockings). In that case would not the obvious way to exclude be by way of some limitation (see s. 68, sub-s. 1)? That suggests a limitation applying to all goods " not being goods that have been used by a consumer," and this has the appearance of legislation by writing in a definition of " goods " not in the Act as passed. The attitude of the

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(1) (1893) 10 R. P. C. 401, 406, 407.

(2) (1907) 24 R. P. C. 249, 262.

House and of the courts to a decision of the Registrar on a question of fact may be summarized as follows: The court, while exercising its own mind, should attach great importance to the Registrar's decision, having regard to his experience. Prima facie the Registrar's decision is correct: see *George Banham & Co., Ld.* v. *F. Reddaway & Co., Ld.* (1); *McDowell* v. *Standard Oil Co. (New Jersey)* (2); *In re Liverpool Electric Cable Co., Ld.'s Application* (3); *In re Alex. Pirie & Sons, Ld.'s Application* (4); *In re J. & P. Coats, Ld.'s Application* (5); *In re Hack's Application* (6); and the observations of Lord Greene M.R. in the present case (7).

Swan K.C. in reply: A trade mark indicates an intrinsic and permanent character: see *Robinson* v. *Finlay* (8). Services performed in connexion with goods, but not altering their intrinsic quality, cannot have a trade mark registered. [He also referred to *In re McGlennon's Application* (9); *Carless, Capel & Leonard* v. *F. Pilmore-Bedford & Sons* (10) and the note on *In re Boots Pure Drug Co., Ld.'s Trade Mark* (11) in Bray and Underhay on the Trade Marks Act, 1938, p. 14.]

The House took time for consideration.

Dec. 8. VISCOUNT MAUGHAM (read by LORD THANKERTON). My Lords, the ultimate question, is simply whether the Registrar ought to accept the word "Rysta" for registration as a trade mark under the present Act, namely, the Trade Marks Act, 1938.

It is clear that at the date of the application the registration claim was not in respect of a prospective use of the mark, but was in respect of the use the respondents had hitherto made of the word to indicate stockings repaired by the "Rysta" process. It would appear, however, that the respondents since the original application have formed and expressed by their amended form of application the intention of offering for sale stockings made by them as opposed to handling stockings of other manufacturers repaired by them. There was no cross-examination or evidence on this question of intention to

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(1) [1927] A. C. 406, 413, 414.

(2) [1927] A. C. 632, 640.

(3) (1928) 46 R. P. C. 99, 110.

(4) (1933) 149 L. T. 199, 201, 202; 50 R. P. C. 147, 158.

(5) (1936) 155 L. T. 127, 128, 129; 53 R. P. C. 355, 375.

(6) (1940) 58 R. P. C. 91, 107.

(7) (1943) 60 R. P. C. 87, 105.

(8) 9 Ch. D. 487, 501.

(9) (1908) 25 R. P. C. 797.

(10) (1928) 45 R. P. C. 205.

(11) [1938] Ch. 54.

Viscount Maugham

manufacture, and for the purposes of my judgment I shall accept the view taken by the Court of Appeal that the intention to use the mark in connexion with stockings manufactured or offered for sale by the respondents has been sufficiently made out.

A number of points have been argued in the courts below and before your Lordships. I propose to deal in the main with three questions :—1. Whether the word "Rysta," if used as a trade mark for stockings, so nearly resembles the word "Aristoc" already on the register in respect of the same class of goods as to be likely to deceive or cause confusion within the meaning of s. 12 of the Trade Marks Act, 1938. 2. Whether the use by the respondents of "Rysta" as a trade mark both upon stockings of the respondents' merchandise concurrently with use by them of the same mark upon stockings which are not their merchandise, but are only repaired by them, is likely to lead to confusion or deception and is therefore unlawful by virtue of the provisions of s. 11 of the Trade Marks Act, 1938, or for other reasons should be rejected by the Registrar. 3. The third question is of a more general kind, namely, whether a mark proposed to be used on or in relation to stockings or other goods for the purpose of indicating, or so as to indicate, the fact that the stockings or the goods had been repaired by the person seeking registration as a trade mark is within the definition of a trade mark contained in s. 68, sub-s. 1, of the Trade Marks Act, 1938, or in other words, whether a mark indicating the mere repair of stockings or, I may add, any other goods, is registrable under the provisions of that Act.

The Assistant Comptroller decided adversely to the appellants on all these questions, and as regards the third question he felt himself bound (1) by a certain ruling in 1928 of the then Assistant Comptroller (Official Ruling 1928 C. the case of the *Bradford Dyers Association, Ld.* (2)) to hold that there could be a proper mark upon cloth sent by manufacturers to dyers for dyeing. He did not, however, notice that the decision of the Assistant Comptroller seems only to have referred to dyeing of cloth in the course of the manufacture or the finishing of the goods before they reached the hands of the public, as to which it may be stated that dyeing goods in general is only one form of the finishing of goods before they reach the market. He also dealt elaborately with the other two questions, and held that there was no likelihood of deception or confusion. Farwell J.

(1) 60 R. P. C. 87, 90.

(2) 45 R. P. C. vi.

stated in his judgment (1) that he was not at all sure that he would have come to the same conclusion as the Assistant Comptroller on the question of resemblance between the words " Aristoc " and " Rysta." He said it was largely a matter of opinion and that he did not think that he ought to reverse the decision of the Assistant Comptroller on that ground alone, having regard to the great care with which that part of the case had been considered by the Assistant Comptroller. He also observed that there was much to be said for the contention that a trade mark was never intended to be applicable to a process of repair applied to an article after it had passed into private hands, but he thought it was not necessary for him to decide that very important question, because there was another ground on which he was prepared to decide the case. That was on the ground that, apart from any resemblance between the words " Rysta " and " Aristoc," the proposed use of the word " Rysta " by the applicants would itself lead inevitably to confusion in the minds of the public. This is the second of the questions above stated. He assumed that if the respondents were entitled to register " Rysta " as their trade mark, they would use it on the stockings which they repaired, but which were not of their manufacture. " This," he said, " it seems to me, " must inevitably lead to confusion in the minds of the public. " A person seeing a stocking with the mark ' Rysta ' on it will " not know whether the stocking has been manufactured or " only repaired by the applicants, and confusion will result." For that reason he thought the Assistant Comptroller should have refused the application.

The Court of Appeal, by a majority represented by Lord Greene M.R. and MacKinnon L.J. (Luxmoore L.J. dissenting), took the other view and allowed the appeal. They did not express any opinion on the question whether the use of the " Rysta " mark in connexion with the business of repairers of stockings was a use of the kind described in s. 68, sub-s. 1, of the Trade Marks Act, 1938. That question was left entirely open ; but, for the purposes of their judgment, they assumed (2) where it was relevant to do so, that the use in relation to repaired stockings was not a trade mark use. They assumed (3) that the respondents were proposing to use the mark as a mark to indicate that the goods were of the manufacture or merchandise of the respondents. On that assump-

(1) 60 R. P. C. 87, 98.
(2) Ibid. 102, 106.
(3) Ibid. 103, 107.

tion the Master of the Rolls (1) rejected the contention that the mark would not possess distinctiveness as indicating that the goods were of the manufacture or merchandise of the respondents, and also the contention that the public would be deceived or confused, on a rather special ground, namely, that the mark could only be affixed in a harmless way by some detachable label, and that if such a label used in the future bore on its face the information that the stockings had been repaired by " Rysta," no possibility of confusion could arise. Even if the word " Rysta " alone was put on the label, the Master of the Rolls thought no deception or confusion was possible, for the reason that the only persons to whose notice the mark would normally come in connexion with the repaired stocking would be the owner of the stocking and the laundry proprietor or cleaner through whose agency it was sent to the respondents for repair. In those circumstances, he thought that it was quite impossible to suppose that either the owner of the stockings or the laundry proprietor or cleaner would be led to think that the mark so attached was intended to indicate that the respondents had any other connexion with the goods than that of repairers. On this ground he thought that the argument based on possibility of deception or confusion broke down. He also differed from Farwell J. because, as he said, the learned judge appeared to have overlooked the fact that the mark when used in connexion with repaired stockings would not be brought to the attention of purchasers of stockings, and that the owner of a stocking sent for repair could not possibly be confused by the use of the mark. Finally, on the question whether the mark " Rysta " so nearly resembles the mark " Aristoc " as to be likely to deceive or cause confusion, he thought (2) he ought to follow the decision of the Assistant Comptroller upon that point, with which in fact he agreed. In substance, MacKinnon L.J. took the same view. He was, however, of opinion (3) that the confusion and possible deception suggested in the ground of decision adopted by Farwell J. was not justified by anything in the Trade Marks Act, 1938, or by any principles of law hitherto applied to that and similar Acts that preceded it. He proceeded to say: " The prohibition in " s. 11 of registering any mark ' the use of which would by " ' reason of its being likely to deceive or cause confusion or " ' otherwise,' refers, I think, only to such use as would, by

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(1) 60 R. P. C. 103, 104.
(2) Ibid. 87, 105.
(3) Ibid. 107.

" similarity or competition with another mark or other marks " or names, be likely to deceive or cause confusion." I may say here that, in my opinion, that particular view of s. 11 cannot be accepted. There is nothing in s. 11 to show that the legislature is there dealing with competing marks. It has been regarded (like s. 11 of the Act of 1905) as a general provision which is to be contrasted with the present s. 12. The latter section is concerned with the competition of the proposed mark with some trade mark belonging to a different proprietor already on the register in respect of the same goods or description of goods, and with the question of the likelihood of deception or confusion between the two marks.. Moreover, the precise point was dealt with in the decision of your Lordships' House in *Bass, Ratcliff & Gretton, Ld.* v. *Nicholson & Sons, Ld.* (1). Lord Russell of Killowen explained his view of s. 11, and said, amongst other things, that " it is to be observed that the likelihood of deception which is contemplated by s. 11 need not " necessarily flow from any resemblance between the matter " proposed to be registered and other matter or another mark. " It might flow from something contained in the matter pro- " posed to be registered," and he added : " In short s. 11 (so " far as relevant) is a prohibition in general terms of the " registration of matter the use of which would not be protected " in a court of justice." For my part, I entirely accept this statement by my noble friend. MacKinnon L.J. also agreed (2) with the view expressed by the Master of the Rolls as to the possible confusion between the two words. Luxmoore L.J. however, preferred (3) to dispose of the appeal on the simple ground that the word " Rysta " was likely to cause confusion, having regard to the existence of the appellants' trade mark " Aristoc." His grounds for differing from his colleagues and the Assistant Comptroller seem to me to be clear and cogent, and I agree with his view as to how the word " Rysta " on the evidence must be taken to be pronounced, and, as to how a considerable number of persons pronounce the word " Aristoc," namely, with the emphasis on the middle syllable. He also stated (4) what is not in dispute, that it is well settled that the onus of proving that there is no reasonable probability of deception is cast on an applicant for registration of a mark : *Eno* v. *Dunn* (5). There follows a passage (4) which I completely accept as a fair statement of the duty cast upon the court in such a case. "The answer to the question whether "the sound of one word resembles too nearly the sound of "another so as to bring the former within the limits of s. 12 of "the Trade Marks Act, 1938, must nearly always depend on "first impression, for obviously a person who is familiar with "both words will neither be deceived nor confused. It is the "person who only knows the one word, and has perhaps an "imperfect recollection of it, who is likely to be deceived or "confused. Little assistance, therefore, is to be obtained from "a meticulous comparison of the two words, letter by letter "and syllable by syllable, pronounced with the clarity to be "expected from a teacher of elocution. The court must be "careful to make allowance for imperfect recollection and the "effect of careless pronunciation and speech on the part not "only of the person seeking to buy under the trade description, "but also of the shop assistant ministering to that person's "wants." And then he adds a little later, "The tendency "to slur a word beginning with 'a' is, generally speaking, very "common, and the similarity between 'Rysta' and 'Ristoc' "would, I think, be fairly obvious. It would not be surprising "to learn that a person asking for 'Aristoc' stockings from a "shop assistant who only knew of 'Rysta' stockings had been "supplied with the latter and vice versa." He also said that he thought that the Assistant Comptroller had failed to take into full account the effect of careless and slurred pronunciation, imperfect recollection, and the limitation of the knowledge of the customer and the shop assistant to one only of the marks, that being the one of which the other is ignorant. He felt strongly that the two words were likely to deceive and also to cause confusion, and that being so, he thought the applicants had not discharged the onus which was on them of proving that there was no likelihood of deception or of confusion. On the other questions, however, raised on the appeal, he found himself in complete agreement with the judgment of the Master of the Rolls.

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(1) [1932] A. C. 130, 152.
(2) 60 R. P. C. 107.
(6) Ibid.
(4) Ibid. 108, 109.
(5) 15 App. Cas. 252, 257–261.

All the three questions which I have stated above were elaborately and very well argued before your Lordships. The appeal might, of course, be decided on a single point, for instance, the point on which Luxmoore L.J. dealt with the case. On the other hand, the Assistant Comptroller dealt with all three questions, and the Registrar of Trade Marks has put in a case and has appeared before us by the Solicitor-General, who has argued the questions other than the first question as above stated. The construction of the definition of a trade mark contained in s. 68 of the Act of 1938 is a matter of great general importance and has been discussed at length. Their Lordships, therefore, think it desirable, in the particular circumstances of this case, to express their views on all three questions.

My Lords, on the first point I am of opinion, with great respect for the views of the Master of the Rolls and MacKinnon L.J. that the word " Rysta " so nearly resembles in sound the word " Aristoc " that if it is admitted to the Register and used in respect of stockings it will be likely to deceive or cause confusion. I agree with and would adopt the passages in the judgment of Luxmoore L.J. above set out. Using the best judgment I can in such a matter, and after carefully considering the reasons for a contrary view stated by the Master of the Rolls and MacKinnon L.J. I am not persuaded that the onus of proving that there is no reasonable probability of deception or confusion has been discharged by the respondents. The case is one very largely of first impression, on which opinions may well differ. My conclusion is that Luxmoore's L.J. view is the right one.

The second point is the one on which Farwell J. decided the case, and in considering it we must disregard the existence of the " Aristoc " mark. The Court of Appeal decided this point on the rather special ground above stated, namely, that the circumstances in which ladies' stockings are sold and repaired are such that deception or confusion are most unlikely to occur. My Lords, I do not think reliance in a question of registration should be placed on the practice which has heretofore existed and been followed by the respondents in their repair of stockings. In the first place it should be remembered that the mark for which the statutory monopoly is sought is for " stockings," and this will include those used by men and boys; and obviously a quite different method of getting stockings repaired might be adopted. Nor need the present system be followed in relation to women's stockings; and the laundry proprietors or cleaners may cease to have any part in the system. It seems to me that if the respondents put upon the market stockings of their own manufacture with a " Rysta " mark consisting of the word alone and continue also the business of repairing stockings of other makes, adding a " Rysta " mark to them, there may come into existence large quantities of stockings of both categories ; and the question is whether there may not be a fair number of people who will have, or who may have, no means of knowing whether the word " Rysta " used as a mark is intended to indicate that the stockings have been made or that they have only been repaired by the respondents. I am not prepared to answer this question in the negative. It is, I think, a matter of general knowledge that stockings are constantly provided by persons for their children or given as presents to friends. Nor do I see anything unlikely in stockings both for men and children as well as women being dealt with, or in the future being largely dealt with, by purchasers and vendors of second-hand stockings. In this connexion it is to be remembered that stockings are largely dealt in all over the country and are bought by rich and poor alike. Moreover, in my opinion, we have to bear in mind the reputation gained by a word mark if it becomes generally known. Women, for instance, may hear the word " Rysta " as denoting a quality in stockings and at other times may hear the word spoken of as denoting merely a repair, and this may lead to confusion. The respondents themselves have in para. 3 of their counter-statement suggested that their goodwill as stocking repairers will help them to sell stockings which they will manufacture in the future if they can obtain a trade mark for the word " Rysta," which has hitherto merely indicated repair. My conclusion, therefore, is that there is no sufficient reason for holding that in the ordinary course of business a number of persons to whose notice the mark " Rysta " will come in connexion with stockings will not be in doubt whether the mark indicates that the stockings have been made by or have merely been repaired by the owners of the mark.

I now come to the third question which is concerned with the true construction of the definition of a trade mark in s. 68, sub-s. 1, of the Trade Marks Act, 1938. This definition takes the place of the definition in s. 3 of the Trade Marks Act, 1905, which ran as follows :—" A ' trade mark ' shall mean a mark " used or proposed to be used upon or in connexion with goods " for the purpose of indicating that they are the goods of the " proprietor of such trade mark by virtue of manufacture, " selection, certification, dealing with, or offering for sale." The main difference between this section and the definition in the Act of 1938 (which I shall cite later) is in the words relating to the *purpose* of the mark. In the one case, the purpose is stated to be that of " indicating that they are the goods of the

" proprietor of such trade mark by virtue of manufacture, " selection, certification, dealing with, or offering for sale." In the other, a much vaguer phrase is used, namely, indicating or so as to indicate " a connexion in the course of trade " between the goods and the proprietor of the mark. I need not refer to the use by a registered user, which means the user under s. 28. It is not in dispute that the definition in s. 68, sub-s. 1, is wider than the older definition. The question is as to the extent of the alteration effected by the use of the words " in the course of trade."

My Lords, it seems to me beyond doubt that hitherto a registered trade mark has been understood as being used in relation to goods for the purpose of indicating the *origin* of the goods, in other words, for the purpose of indicating either manufacture or some other dealing with the goods in the process of manufacture or in the course of business before they are offered for sale to the public. It must be remembered that in the early days when trade mark law was being slowly laid down, chiefly in Chancery Courts (where alone an injunction could be obtained), a trade mark was inevitably taken as indicating the origin of the goods. It was used for the purpose of indicating that the goods were those of the manufacturer or the merchant of the goods. It was closely connected with the goodwill of his business, of which it was often a valuable item, for the mark represented a quality or character on which the purchaser could place reliance. The cases mentioned in the introductory chapters of Sebastian on Trade Marks (5th ed.) and Kerly on Trade Marks (6th ed.), which are too numerous to be cited here, are conclusive in my opinion to show that, until at any rate the recent Act, trade marks were always taken as indicative of the origin of the goods. The actual phrase is often used; and in other cases the same view is implicit. Bowen L.J. was not laying down any new law when he said: " It seems to me the answer is to be given by the simplest " consideration of what is really the function of a trade mark. " The function of a trade mark is to give an indication to the " purchaser or possible purchaser as to the manufacture or " quality of the goods—to give an indication to his eye of the " trade source from which the goods come, or the trade hands " through which they pass on their way to the market." (*In re Powell's Trade Mark* (1)). This passage was not obiter dictum but the reason for that part of the judgment. It has not

(1) [1893] 2 Ch. 388, 403, 404.

infrequently been cited and so far as I know it has never been adversely criticized. I think it was undeniably correct in 1893. In my opinion the same view was taken by the legislature when the Trade Marks Act, 1905, was passed, including for the first time a definition of a trade mark for the purpose of that Act. The purpose of a mark was said to be that of indicating that they " are the goods of the proprietor of such " trade mark by virtue of manufacture, selection, certification, " dealing with or offering for sale." It is argued that the words " dealing with " are sufficiently wide to cover any operation on the goods by a trader or workman after the goods have come into the hands of a member of the public, however slight the effect of the operation may be, and however little it indicates the origin of the goods or their character or quality. Having regard to the repeated statements in the authorities that a registrable mark must be an indication of origin, and to the fact that the words " dealing with " (not, be it observed, " dealing in ") are found in the midst of other words which have that general meaning, I am quite unable to take the view that the function of a trade mark was being so radically altered. It is admitted by the respondents, and it was indeed pointed out by the Assistant Comptroller, that a trade mark could not be registered for a process or an operation ; but the Assistant Comptroller was of opinion that it could have the benefit of registration if the mark was for goods to which the process or the operation had been applied. The distinction can readily be understood by lawyers ; but I doubt whether traders and the public will appreciate it. In a commercial sense and in substance it tends to give a trade mark for the process or operation ; for it merely indicates that the process or operation has been applied. And there would seem to be nothing in the Act, if the respondents are right, to require them to indicate by the mark the precise extent of the operation. It might be only for a single strand of the stocking, or for the repair of one toe : yet the mark would be given for the stocking—a surprising result. That a trade mark must still be related to origin was the view taken by my Lord Macmillan in this House in the case of *Bass, Ratcliff & Gretton, Ld.* v. *Nicholson & Sons, Ld.* (1), where he observed that " a trade " mark must have been used ' for the purpose of indicating ' " the origin of the goods in connexion with which it is used." The well-known text books I have already referred to have

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(1) [1932] A. C. 130, 155.

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taken the same view (see Sebastian on Trade Marks, 5th ed., pp. 4 and 5 ; Kerly on Trade Marks, 6th ed., at pp. 27, 31, 35). A number of other cases might be cited ; but I will add only one more, and that one of high authority. In the case of *Irving's Yeast-Vite, Ld.* v. *Horsenail* (1) the question was whether the word " Yeast-Vite " had been used as a trade mark. Lord Tomlin, in deciding that it had not been so used, said (2) : " It is not a use of the word as a trade mark, that is, " to *indicate the origin* of the goods in the respondent by virtue " of manufacture, selection, certification, dealing with or " offering for sale," and, again (3) : " The phrase ' the exclusive " ' right to the use of such trade mark ' carries in my opinion " the implication of use of the mark for the purpose of indicating in relation to the goods upon or in connexion with " which the use takes place, the origin of such goods in the " user of the mark by virtue of the matters indicated in the " definition of ' trade mark ' contained in s. 3." These observations had reference to the definition of " trade mark " contained in s. 3 of the Trade Marks Act, 1905, as amended by the Act of 1919. The history of the matter affords further ground for the same view of the essential nature of a trade mark. It must be observed that there is a very striking difference between a mark intended to indicate origin and one intended to signify repair, cleaning, or some analogous process after, and it may be long after, the goods have come upon the market. The former will indicate a character or quality which will ordinarily remain so long as the goods remain recognizable. The latter may indicate a purely temporary connexion with the goods such as repairing, washing, cleaning or adjusting them ; and I am not able to see why the principle should not extend to the connexion by warehousing or carrying the goods. Not only may the effect of such operation be quite ephemeral, but such operations may be repeated many times (with or without the consent of the owners of the goods) by different persons, and only one or some of these persons may desire to affix a trade mark to the goods. A washing mark or a cleaner's tab is usually affixed only to indicate that the articles are the property of a certain customer, that is, to prevent loss ; but if the respondents' view is right such persons may obtain a trade mark for the goods when washed or cleaned. In the course of a few years there may be, on the same hypothesis, half a dozen different marks attached to the goods, each indicating that a laundry-man or a cleaner has washed or cleaned the articles at some generally unknown time in the past—a matter of no interest to the owner of the goods and giving no information as to their character or quality. The usual phrase that the mark should be distinctive, meaning "adapted to distinguish the goods of the proprietor of the "trade mark from those of other persons" (s. 9 of the Act of 1905) would seem to be curiously inappropriate if (to take an example) a number of piano-tuners or painters or overhaulers of motor cars or other mechanical instruments were to affix their respective marks from time to time. And it is clear that the value of the mark of origin, whether used by the maker or the merchant, would in some cases be rendered of little value. It is not clear to me that the purchaser of the article second-hand would be able to tell who was the maker or merchant on whose reputation he was disposed to rely. Many other and perhaps better illustrations might be given. My opinion is that until at any rate the recent Act there was no ground at all for the view that the basic meaning of a trade mark as a mark signifying origin had been altered by the legislature.

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(1) (1934) 103 L. J. Ch. 106 ; 51 R. P. C. 110, 111.

(2) 103 L. J. Ch. 106, 109 ; 51 R. P. C. 110, 115.

(3) 103 L. J. Ch. 106, 110 ; 51 R. P. C. 110, 116.

But then comes the Trade Marks Act, 1938, (which consolidated various amendments in preceding Acts) with a new definition of a trade mark in s. 68, sub-s. 1: "In this Act, "unless the context otherwise requires, the following ex-"pressions have the meanings hereby assigned to them "respectively, that is to say . . . . 'trade mark' means, "except in relation to a certification trade mark, a mark used "or proposed to be used in relation to goods for the purpose "of indicating, or so as to indicate, a connexion in the course "of trade between the goods and some person having the right "either as proprietor or as registered user to use the mark, "whether with or without any indication of the identity of that "person, and means, in relation to a certification trade mark, "a mark registered or deemed to have been registered under "s. 37 of this Act." There is also an amendment (as contrasted with the Act of 1905) in s. 9, as to the distinctiveness requisite for registration in Part A. There is there a reference to the quality of distinguishing "goods with which the pro-"prietor of the trade mark is or may be connected in the course

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" of trade, from goods in the case of which no such connexion " subsists." The present tense should be noted. Have these amendments, or has anything else in the Act, altered the essential nature of a trade mark as being generally limited to an indication of origin?

My Lords, I am unable to take the view that so vital an alteration could have been intended by the words used without much clearer language. There was, as far as your Lordships are aware, no demand among commercial men for any such an alteration, and certainly there was no custom in the Registrar's office to accept trade marks in substance intended to indicate a process or any mere operation on goods. If the new definition had been meant to extend to a mere temporary connexion with goods after they have come into the hands of the public, I should have expected some qualification as to the nature of the right conferred. In such a case as this I think the remark in Maxwell on the Interpretation of Statutes, 8th ed., p. 73, ought to have weight, namely, that no substantial alteration of the law is to be anticipated in an amending Act unless that is clearly indicated. There is no such indication here. It is to be observed that under s. 4 of the new Act the proprietor of the repair mark (if I may so describe it) would have the exclusive right to the use of that mark in relation to the goods repaired. Why a person who has performed an operation of repair for his customer should be given a permanently exclusive right to a mark used to indicate that at some past date he repaired the article I do not understand. And I do not think the language of s. 9, which I have quoted, is apt to describe a temporary connexion such as is now in question. The last words in that section seem to contemplate a continuing connexion. Authority is also against the contention that the new definition has the effect in question. In *Bismag, Ld.* v. *Amblins* (*Chemists*), *Ld.* (1), my noble friend Lord Clauson (then Clauson L.J.) had to deal with the point. After referring to the old definition (in the Act of 1905) and the change in the modern Act he said this: " That " definition still, as I read it, treats a trade mark as something " which indicates origin, but whereas the old definition con- " templates that the trade mark is to be used upon or in " connexion with goods as an indication of origin, the new " definition contemplates that the trade mark may be used not " only upon or in connexion with goods but ' in relation to " ' goods '." And in other passages of his judgment he emphasized the essential function of a trade mark, namely, that it indicates the origin of the goods. The decision may perhaps be criticized; but that observation is, I doubt not, correct. In *Saville Perfumery, Ld.* v. *June Perfect, Ld.* (1) it was observed by Lord Greene M.R.: "In an infringement "action, once it is found that the defendant's mark is used as a "trade mark, the fact that he makes it clear that the commercial origin of the goods indicated by the trade mark is "some business other than that of the plaintiff avails him "nothing, since infringement consists in using the mark as a "trade mark, that is, as indicating origin." This passage was approved by your Lordships when the case came before this House (2). It fell to my duty to write the leading judgment, but it was approved in all respects by my noble friends Lord Atkin and Lord Russell of Killowen. I am therefore justified in saying that the statement of the Master of the Rolls was adopted as being correct by this House; and it is imposible to reconcile it with the view on behalf of the respondents with which I am now dealing.

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(1) [1940] Ch. 667, 692.

My conclusion on a careful consideration of the Act of 1938, and of the authorities, is that the repair of stockings undertaken or proposed to be undertaken by the respondents does not constitute "a connexion in the course of trade" within the meaning of the Trade Marks Act, 1938, and that a trade mark for stockings intended merely to indicate that they have been repaired by the person claiming to register such a mark cannot be accepted for registration. The claim is not improved in this case by the statement that the respondents also intend to use the mark "Rysta" on stockings of their own manufacture, in order to get the benefit of the goodwill they have acquired in the repair of stockings in connexion with the same word. I should add that it is not necessary in my opinion to determine the precise effect of s. 11 of the Act. The reasons I have given above, if correct, are sufficient to show that whether under that section, or under the general discretion of the Registrar, the mark cannot be accepted. The result is that in my opinion the appeal should be allowed, with costs, and the judgment of Farwell J. should be restored. I move your Lordships accordingly.

Lord Thankerton. My Lords, I have had the privilege of considering the opinion which has just been delivered by my

(1) (1939) 58 R. P. C. 147, 161. (2) (1941) 58 R. P. C. 147, 174.

noble and learned friend, and I find myself in such complete agreement with his reasoning and his conclusions that I need only add one further observation on the construction of the definition of a trade mark in s. 68, sub-s. 1, of the Act of 1938, and in particular the words " a mark used or proposed to be " used in relation to goods for the purpose of indicating, or so " as to indicate, a connexion in the course of trade between " the goods and some person . . . ." In my opinion the " connexion in the course of trade" refers to trade in such goods, and repairers of goods which have already reached the hands of the public cannot be said to be trading in such goods. I agree with the motion proposed by my noble and learned friend.

Lord Macmillan. My Lords, it will be observed that in the oddly phrased statement in para. 3 of their counter-statement, the respondents do not express an intention to manufacture stockings but only to offer stockings for sale. The genuineness of their intention to enter on the business of dealing in stockings as manufacturers or vendors has not been challenged. The upshot is that, the word " Rysta " having acquired a widespread and favourable reputation as indicative of their stocking repair process, they propose to use it for stockings to be sold by them. They have throughout frankly avowed that, if their application is granted and the word " Rysta " is registered as a trade mark for stockings, they will continue to use the word on stockings which they have only repaired, and they have maintained that they would be within their rights in so using it as a registered trade mark. The application having come before the Assistant Comptroller, acting for the Registrar, he issued his decision authorizing it to proceed. In the course of his decision he expressed the view (1) that " if any person repairs " the stockings of other persons as a matter of business, the " stockings that he repairs are rightly to be regarded as " connected in the course of trade with him." The consequence is that if the respondents obtain registration of the trade mark " Rysta " for stockings, as the Court of Appeal, reversing the judgment of Farwell J., have decided, the respondents will have the authority of the Registrar for using " Rysta " as a trade mark for stockings which they have neither manufactured nor sold but have only repaired. The remarkable result ensues that although the Registrar had advised the respondents that " registration cannot be obtained for a repair-

(1) 60 R. P. C. 87, 90.

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"ing system or service," nevertheless, if the respondents are authorized to register the trade mark "Rysta" for stockings, they will be entitled, according to the Assistant Comptroller, to use it to denote that they have applied a repairing system or service to stockings of any manufacture. The Court of Appeal did not deal with this aspect of the case, which was not fully argued before them, as they proceeded on other grounds. The matter was, however, elaborately developed in argument at your Lordships' bar both on behalf of the parties and on behalf of the public interest by the learned Solicitor-General, who supported the view expressed by the Assistant Comptroller and urged the importance of having that view either affirmed or negatived. As the judgment of the Court of Appeal, if the view of the Assistant Comptroller stands uncontroverted, would justify the respondents in using the word "Rysta" as a trade mark for their repairing system or service, I agree with your Lordships that this House should pronounce on the matter.

In my opinion the view expressed by the Assistant Comptroller is unsound, and is inconsistent with the true function of a trade mark. The Act of 1938 in s. 68, sub-s. 1, defines a trade mark as "a mark used or proposed to be used in relation "to goods for the purpose of indicating or so as to indicate a "connexion in the course of trade between the goods" and the person having the right to use the mark. In construing this definition it is essential to bear in mind what is the function of a trade mark. If there is one thing that may be described as fundamental in this branch of law it is that the function of a trade mark is to indicate the origin of the goods to which it is applied. As it was expressed by Bowen L.J. in *In re Powell's Trade Mark* (1): "The function of a trade mark is to give an "indication to the purchaser or possible purchaser as to the "manufacture or quality of the goods—to give an indication to "his eye of the trade source from which the goods come, or "the trade hands through which they pass on their way to the "market." I could multiply quotations to the same effect. I was merely repeating a commonplace when on a former occasion I said in this House that it is "of the essence of a "trade mark that it should indicate origin and be used as "indicative of origin": *Bass, Ratcliff & Gretton, Ld.* v. *Nicholson & Sons, Ld.* (2). It is true that these pronouncements were made before the passing of the Act of 1938 and that this statute enacted a new definition of a trade mark in

(1) [1893] 2 Ch. 388, 403, 404. (2) [1932] A. C. 130, 154, 155.

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the words which I have quoted, and also in s. 4, when defining the right given by registration, used new language, viz., that registration of a person as the proprietor of a trade mark in respect of any goods should give that person " the exclusive " right to the use of the trade mark in relation to those goods." But I do not agree that thereby " a radical alteration in the " law relating to trade marks " has been effected, or that there has thereby been conferred " a right crucially different in " principle from the rights heretofore enjoyed by the owners of " trade marks," as Greene M.R. and Clauson L.J. held in *Bismag, Ld.* v. *Amblins* (*Chemists*), *Ld.* (1). I do not think that the widened language of the Act of 1938, has inferentially altered the essential conception of a trade mark in law, and in this I agree with and prefer the judgments in the *Bismag* case of my noble and learned friend, then Simonds J. (2), and MacKinnon L.J., whose reasoning I need not repeat. A trade mark must still be registered in respect of goods, it must be used in relation to goods, it must indicate a connexion in the course of trade between goods and the user of the trade mark. A trade mark must thus be used in trade. " Trade " is no doubt a wide word but its meaning must vary with and be controlled by its context. A connexion with goods in the course of trade in my opinion means, in the definition section, an association with the goods in the course of their production and preparation for the market. After goods have reached the consumer they are no longer in the course of trade. The trading in them has reached its objective and its conclusion in their acquisition by the consumer.

The respondents in carrying on the business of repairing stockings do not in my opinion trade in stockings. They do not trade in any goods. They effect repairs on other people's goods. The learned Solicitor-General suggested that a mark used by a repairer might qualify as a trade mark inasmuch as it was the use of a mark in relation to goods, and that the repaired goods might be said to originate with the repairer. The repairs may have originated with the repairer but the goods repaired have in no sense originated with him. He has not in any way contributed to their production for the market. Repairs are not goods. The Registrar was right when he said that registration cannot be obtained of a trade mark for " a repairing system or " service. The use of a registered trade mark by a repairer on or in relation to goods which he has merely repaired might well

(1) [1940] Ch. 667, 677, 695.

(2) Ibid. 225.

lead to confusion for it would imply, contrary to the fact, that the goods had in some way originated with him. Farwell J. and the Court of Appeal, as I have said, found themselves able to dispose of the present case without deciding the important general question with which I have just dealt, though Farwell J. thought there was much to be said for the view which I have expressed. The Master of the Rolls, for the purpose of his judgment, assumed (1) that "the use in relation to repaired "stockings is not a trade mark use," but expressly reserved the question as entirely open. Both he and MacKinnon L.J., treating the case as an application to register the word "Rysta" as a trade mark to be used for stockings and not for the repair of stockings, were of opinion that it should be granted because there was no likelihood of deceit or confusion occurring either generally or by reason of the resemblance between the word "Rysta" and the word "Aristoc." Luxmoore L.J. dissented on the ground of the resemblance between the two words.

I would observe that the Act does not confer any absolute right to obtain registration of a trade mark if certain conditions are satisfied. The Registrar has a general discretion in the matter (s. 17, sub-s. 2), and the court on appeal possesses the same discretionary powers (s. 52). It is thus proper to take into account, in considering the question of the admission of a trade mark to the register, the whole circumstances of the past user and the intended future user of the mark. The word "Rysta" is not a newly invented word intended to be used in a trade about to be inaugurated by the respondents. On the contrary, the respondents with justifiable pride claim that the word has acquired a wide and favourable recognition by the public, as the name of their method of repairing stockings manufactured or sold by other people. They propose now to use the word with a new signification as denoting stockings to be manufactured or sold by themselves. At the same time they make no secret of their intention to continue the use of the word for stockings only repaired by them and, supported by the Assistant Comptroller, they maintain their right to do so. In future, accordingly, a member of the public seeing the word "Rysta" on a pair of stockings will not know whether, as he has always hitherto understood, it denotes that the stockings have only been repaired by the respondents or whether it denotes that they are the goods of the respondents. The

(1) 60 R. P. C. 102, 106.

repairs, it will be remembered, are invisible. The respondents might in future repair stockings of their own manufacture; in that case the mark might be indicative of origin or of repair or of both. It is no doubt true that the owner of a pair of stockings sending them to the respondents for repair and receiving them back with the word " Rysta " attached would know that the word indicated repair by the respondents. But this is to take too narrow a view of the possibilities. Suppose that stockings marked " Rysta " which the respondents have only repaired are placed in a drawer with stockings marked " Rysta " which the respondents have manufactured, who can tell which are which? It is common knowledge that silk stockings are a most popular form of gift. If a gift is made of stockings manufactured by the respondents and bearing the trade mark " Rysta," will the receipient, to whom " Rysta " is, as the respondents proclaim, a household word for stockings repaired by the respondents, not be liable to think that the gift is of a secon-dhand article? I need not pursue the possible, indeed probable, eventualities. I agree with Farwell J. in his view that the ambiguities which would attend the use by the, respondents of the word " Rysta," if registered as a trade mark might well be likely to cause confusion in the public mind. Lastly, I find myself in agreement also with Luxmoore L.J. in holding that the proposed trade mark " Rysta " ought not to be registered because it so nearly resembles, phonetically, the appellants' trade mark " Aristoc " as to be likely to cause confusion. If I say no more on this aspect of the case it is only because the learned and lamented lord justice has so adequately and convincingly dealt with it. On all grounds I am for allowing the appeal and refusing the respondents' application.

Lord Wright (read by Lord Macmillan). My Lords, I agree with the opinion of the noble and learned Viscount on the woolsack, which I have read in print. I add some brief observations in deference to the distinguished judges who have taken a different view. In my opinion the Assistant Comptroller should have refused to register the respondents' mark in virtue of s. 12 of the Trade Marks Act, 1938. On that issue I am in complete agreement with the judgment on this point delivered in the Court of Appeal by Luxmoore L.J. Indeed I am so completely in accord both with his conclusion and his reasoning that I need say no more on this issue. The central question—

that is, the degree of similarity between the appellants' and the respondents' marks—is, it is true, one which depends on the judge's personal impression, whether visual or phonetic. He cannot shelter under another judge's decision. But he has to envisage the circumstances in which visual or phonetic confusion is or is not likely to arise. On this I do not repeat what Luxmoore L.J. has so admirably said. It is true that great weight must always be given to what the Comptroller and Assistant Comptroller had decided. But that decision does not relieve the judge of his own individual responsibility. In this case I venture to take a view different from that of the Assistant Comptroller and the majority of the Court of Appeal. This would in itself be sufficient to decide the appeal in the appellants' favour, but both sides have asked that the appeal should be decided on other and broader issues of principles, and in particular the Solicitor-General has submitted that the issues he raised were matters of general importance and of public interest. I shall now deal with them. The issue raised and argued by the Solicitor-General and by the respondents' counsel is whether, under the Act of 1938, it is competent to register as a trade mark a mark which the applicant intends to use as a trade mark on goods which he has repaired after the goods have been sold or have otherwise reached the public. In other words would the definition in s. 68, sub-s. 1, of the Act be satisfied on the basis that the fact of repairing constitutes " a connexion " in the course of trade " between the goods repaired and the applicant ? The Assistant Comptroller has held that it would. The goods in question in this case were stockings. The respondents had since 1929 carried on a large business of repairing stockings by a secret process. In their counter-statement laid before the Assistant Comptroller they stated that they intended to offer for sale stockings bearing the brand name " Rysta," and applied for registration of the mark which they said they desired to use to exploit the goodwill built up by them in the mark in connexion with stockings, over the long period of trading by them under the said mark in connexion with their stocking-repairing business. Their counsel expressly claimed that the trade mark would give them the right to use it for stockings made by them or for stockings which they had merely repaired. It was therefore necessary to decide whether it was a legitimate use of the trade mark to use it to indicate that the stockings had been repaired by the respondents, though no further connexion existed between them and the goods.

The definition of trade mark in the Act of 1905 was much narrower than that in the Act of 1938. But the Assistant Comptroller relied on a decision of the then Assistant Comptroller under the Act of 1905, the *Bradford Dyers Case* (1). In that case registration of a trade mark for a concern which dyed and finished cloth which it had not manufactured was upheld. But two points are to be noted. In that case the applicants were specialists who carried out particular processes in the course of and as part of the manufacture and did so before the goods were offered to the public in the market. It might thus be said that the goods at the particular stage of the production were the goods of the proprietor of the trade mark by virtue of manufacture, which was enough under the definition in s. 3 of the Act of 1905, even though the applicants there were merely sub-contractors to carry out the particular processes which had to be completed before the principal manufacturers could place the goods, as vendible goods, on the market. The facts of that decision did not therefore furnish any parallel for what the respondents claim to do if they are able to register the trade mark. The question must now be approached on the basis of the definition in s. 68, sub-s. 1, of the Act of 1938, and in particular the words " used or proposed to " be used . . . . so as to indicate a connexion in the course of " trade between the goods " and the proposed proprietor of the mark. These are indeed very general words, which replaced the catalogue of specific kinds of connexion contained in s. 3 of the Act of 1905. They undoubtedly changed the law to some extent, but they did not in my opinion change the fundamental idea of the function of a trade mark, which was to indicate *the origin* of the goods. Lord Macmillan in *Bass, Ratcliff & Gretton* v. *Nicholson & Sons, Ld.* (2), was fully justified in dwelling on this aspect. I need not repeat the authorities under the old law which support him. I do not think so radical a change in the law could have been intended or can be taken to have been intended by the actual change in language made in the Act of 1938. According to established rules for the interpretation of statutes, much more specific words would have been necessary. There is a fundamental difference between the " origin " of goods, that is between that which gives them their permanent and essential character before they leave their source of origin, and a mere repair or processing which may be done at any subsequent time and is merely partial and evanes-

(1) 45 R. P. C. vi.

(2) [1932] A. C. 130, 154, 155.

cent, like the repair of " ladders " in stockings or the processing or servicing of goods which does not affect their essential character. The word " origin " is no doubt used in a special and almost technical sense in this connexion, but it denotes at least that the goods are issued as vendible goods under the aegis of the proprietor of the trade mark, who thus assumes responsibility for them, even though the responsibility is limited to selection like that of the salesman of carrots on commission in *Major Brothers* v. *Franklin & Son* (1). By putting them on the market under his trade mark he vouched his responsibility, and the carrots were " his goods " by selection, though he was neither the owner nor grower of them. The limitation in the Act of 1938, " in the course of trade," sufficiently, in my opinion, preserves the essential and characteristic function of the mark. The proprietor is required to be a trader who places the goods before the public as being his goods. That is the vital connexion, not some later partial and ephemeral attribution to some one else. " Trade " is a very wide term : it is one of the oldest and commonest words in the English language. Its great width of meaning and application can be seen by referring to the heading in the Oxford English Dictionary. But it must always be read in its context. That gives it the special connotation appropriate to the particular case. In the Act of 1938 the context shows that " trade " refers to selling or otherwise trading in the goods to which the mark is applied. Thus in s. 26, sub-ss. 2 and 6, we find the words " goods to be sold or otherwise traded in " ; the same collocation of words is found in s. 31 ; and again in s. 68 in the definition of limitations. These instances show that " trade " is here used in the particular sense of merchanting, selling or the like, which would nowadays include the more modern practices of hire purchase, leasing (e.g., of valuable machines), letting out for public use, exporting, etc. But equally it is clear that repairing or processing or the like is not included, because it is not trade in the particular sense intended. This construction is consonant with the established user in the past of the word " trade-mark " and the established definition of its functions. In my opinion the Comptroller ought, in exercising his jurisdiction under s. 17 of the Act, to have refused to register the trade mark. The registration should in my judgment be held invalid.

The Solicitor-General on behalf of the Comptroller, arguing for the opposite view, has contended that the definition of trade mark in s. 68 of the Act calls for a wider interpretation which would include the use of a trade mark for repairing or other services to goods even though they are already the subjects of an existing trade mark indicating origin, with the consequence that further trade marks covering the same goods might be accumulated as different services for repairs, or even more ephemeral services like the valeting or cleaning of clothes or laundry work on garments, which are from time to time rendered to the goods. He has stated that the Comptroller has made a practice of registering such trade marks, and further that the practice is advantageous in the public interest. It is, however, clear that if such a practice does not come within the terms of the Act (and I think it does not), it is not lawful, however convenient. If the law is to be altered, that must be done by Parliament, which can consider all the different factors relative to the proposed change of the law. The appellants have pointed out that if the impugned trade mark is upheld, it would lead to serious confusion. They have acquired a very important goodwill as manufacturers and sellers of stockings under the " Aristoc " mark, and have sold them in quantities running into several millions over about twenty years. It is pointed out on their behalf that if every time one of their stockings was repaired by the respondents, they would be entitled to put on it their mark " Rysta," the public could never know whether the appellants or the respondents had made the stocking. This uncertainty (which may be taken merely as an illustration of what might happen in a great number of other instances if the respondents' claim were justified), will almost inevitably deceive or cause confusion. The public would not know whether the stockings were made by or merely repaired by the respondents. This risk of confusion is a different risk from that which follows from the phonetic similarity between the words " Aristoc " and " Rysta " or arises in other like instances of competing marks. It is not here necessary to decide whether the case comes within the terms of s. 11 of the Act of 1938, which prohibits the registration as a trade mark of any matter which, by reason of being likely to deceive or cause confusion or otherwise, would be disentitled to protection in a court of law, or would be contrary to morality, etc. The test under the section obviously is whether " Rysta " if used as a trade mark on repaired stockings would be disentitled to protection in a court of law by reason of its being likely to deceive or cause confusion or otherwise. I am disposed to think that the terms of the section would apply to such facts. But I need not definitely decide that, because (quite apart from the construction which I adopt of the definition in s. 68), the Comptroller ought not in my opinion to exercise his discretion under s. 17 in favour of the respondents. There is here a general risk of confusion which in the public interest should not be authorized. The question is not merely one of competing marks and the rights inter se of their respective proprietors. I have shortly set out these considerations which together with Lord Maugham's more detailed examination of the whole question, lead me to concur in the motion he has proposed. I would allow the appeal.

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(1) [1908] 1 K.B. 712.

Lord Simonds. My Lords, I would allow this appeal. In the first place the respondents have in my opinion failed to discharge the burden which lies upon them of showing that their proposed trade mark " Rysta " does not so nearly resemble the registered trade mark " Aristoc " as to be likely to deceive or cause confusion. Upon this question I find myself in complete accord with the reasoning and conclusion of Luxmoore L.J. A comparison of the two words " Rysta " and " Aristoc," syllable by syllable, may be necessary as a test, though it will serve to emphasize differences rather than similarities. But I think that the truer test is to take the hypothetical case of a saleswoman, who has heard of " Rysta " stockings but not of " Aristoc " stockings, being asked by a customer whether she has any " Aristoc " stockings. Is there in such a case a reasonable possibility that she will think that it is " Rysta " stockings for which the customer is asking? The answer is necessarily one of first impression, but no doubt is left in my mind that there is a real danger of confusion. It is easy perhaps to exaggerate the risk of careless pronunciation, but it may at least be said that the standard of ordinary speech is not the precise articulation of the perfect announcer and that the inquiry for one article or the other will not be made in the quiet atmosphere of the studio. There is in my opinion ample ground for refusing the application under s. 12 of the Act.

But though this is sufficient to dispose of this case, other questions of wider import have been raised, on which your Lordships are agreed that it is right for this House to express an opinion. I do not think it necessary to restate the facts and documents. It is sufficient to say that the Registrar, when the application to register "Rysta" as a trade mark was before him, could not properly come to any other conclusion than that (*a*) the applicants had in the past purported to use "Rysta" as a trade mark in respect of stockings not of their own merchanting, which they had repaired by the well known "Rysta" process and (*b*) that in future they intended to use the same trade mark in respect both of stockings of their own merchanting and of stockings not of their own merchanting but repaired by them. He might assume complete bona fides on the part of the applicants, disregarding the suggestion that they had no real intention to manufacture or sell stockings. He might also assume that, if and when they used the same mark in respect of both classes of goods, they would at least not intentionally so use it as to create any confusion. Here, as it appears to me, two questions were involved for the consideration of the Registrar, first, whether the process of repair created such a "connexion in the course of trade" between the repaired stockings and the applicants as to justify the registration of a trade mark in respect of the stockings so repaired, and, secondly, if this question should be answered in the affirmative, whether, however well intentioned the applicants, it was right to register a trade mark with the knowledge that it was intended to be used in respect of goods of such essentially different character as stockings merchanted by the applicants and stockings of other manufacture repaired by them. Upon the first question your Lordships have not the advantage of a judgment of the Court of Appeal, who found it possible to dispose of the case without determining it. It is, however, a question on which the learned Solicitor-General has expressly invited a decision, and it is one that is clearly of far reaching importance. To me the answer seems plain. It was established beyond all doubt before the Trade Marks Act, 1938, that the function of a trade mark was to indicate the origin of goods. The language of the preceding Act of 1905 is explicit: "for the "purpose of indicating that they are the goods of the proprietors "of such trade mark by virtue of manufacture, selection, "certification, dealing with or offering for sale." It is "the "goods" which are indicated by the mark to be the goods of the proprietor of the mark. The extreme limit of the meaning of these words was reached in *Major Brothers* v. *Franklin & Son* (1), where a market salesman selling goods on a commission was able to register a trade mark in respect of goods so

(1) [1908] 1 K. B. 712.

sold. But no judicial authority has been cited for the proposition that a valid trade mark could be obtained under the old Act in respect of goods to which the applicant had rendered some service, such as repair or cleaning. The definition of trade mark in the Act of 1938 differs in some respects from that in the earlier Act. The substantial change—and the only one that affects the present question—is the introduction of the words " a connexion in the course of trade between the goods and some " person having the right . . . . to use the mark." The mark no longer indicates that goods are the goods of the proprietor of the mark by virtue of one of the enumerated facts. It indicates only " a connexion in the course of trade " between the goods and the user of the mark. It is right, perhaps, to assume that the new words are wider than the old. But it would in my opinion be wrong to conclude that a change of a revolutionary character has been effected unless the language enforces that conclusion. It is not, I think, an exaggeration so to describe the change involved in the respondents' claim. It is in effect a claim to register a trade mark in respect of goods (for it is only in respect of goods that a mark can be registered) by reason of some operation performed on them after they have reached the hands of the public. This is something fundamentally different from the connexion previously existing between the goods and the mark: it is not the origin of the goods that is now to be indicated, but the fact that something has been done to them, and that something may be of an impermanent nature in no way affecting the character or quality of the goods themselves. I should be driven only by the most cogent words to the conclusion that such a change was effected by a change of definition in the statute. But in truth there is no reason for ascribing any such effect to the relevant words " connexion in the course of trade." The word " trade " has many meanings, wide or narrow, according to the context in which it is found. It is by the ascription to it of a wide meaning in s. 68 of the Act that the respondents support their claim. But it appears to me that the subject matter, the history of the law and the context in which the word is found both in s. 68 and elsewhere in the Act, unite to deny to it any such meaning. It might be true to say that the respondents carry on a trade which is connected with stockings, just as a cleaner carries on a trade which is connected with the goods that he cleans or a piano-tuner a trade connected with the piano he tunes, but it does not follow, and in my opinion it is not the fact, that there is in any such case such a connexion in the course of trade between the goods and the person rendering that service or performing that operation as to satisfy the definition in s. 68. It is unnecessary, and would be dangerous, to attempt to give a positive and exhaustive meaning to the word " trade " in the definition. It is sufficient to say that it can bear no wider meaning than it would bear if the words " in the goods " were added after it. The test is then whether the applicant for the mark can be said to trade in the goods, and this test is clearly not satisfied by one who merely renders some service in respect of them after they have reached the public. These considerations in my opinion should have led to the refusal by the Registrar of the application for registration. He should have taken a realist view of the position and not allowed the fact (which I will for this purpose assume) that at some time in the future the applicant might use the mark to indicate the origin of the stockings in relation to which it was used, to obscure the fact that it was the immediate intention to use it so as to indicate not the origin of the stockings but a connexion which I hold to be not a valid ground for registration.

This leads me to the second question which the Registrar had to consider. Assuming, contrary to what is in my opinion the true view, that the process of repairing stockings which have reached the public is a " connexion in the course of trade " which will support registration of a mark, ought the Registrar to register such a mark when he has been told that the goods in respect of which it is intended to be used will be (*a*) stockings repaired by the applicants and (*b*) stockings manufactured by them ? I think, clearly not. It appears to me that in such circumstances it is impossible for the applicant to discharge the burden which lies upon him of showing that there is no likelihood of deception or confusion. An enumeration of the conditions in which there is not likely to be deception or confusion does not satisfy me that there may not be other conditions in which they may occur. The precise scope of s. 11 of the Act is not easy to define, though I would venture to emphasize what has already fallen from your Lordships, that it is certainly not limited in its operation to cases of similarity or competition between the proposed mark and another mark. It is sufficient for the purpose of this case to say that there is an inherent probability of confusion arising from the same mark being used to distinguish two articles which are essentially different in origin and may be wholly different in character

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and quality, and that when that factor is present the Registrar ought to refuse registration. I concur in the motion that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Peacock & Goddard, for Browne, Jacobson & Hallam, Nottingham.*

Solicitors for respondents: *Timbrell, Deighton & Nichols.*

Solicitor for Registrar of Trade Marks: *Solicitor to the Board of Trade.*

[PRIVY COUNCIL.]

J. C.*

1945

Jan. 18.

VIGNEUX AND OTHERS . . . . APPELLANTS;

AND

CANADIAN PERFORMING RIGHT SOCIETY, LIMITED . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Copyright—Musical works—Public performance—By radio receiving set or gramophone—Statutory exemption from payment of fee—No infringement of copyright—Unqualified exoneration—Copyright Amendment Act, 1931, *c.* 8, *as amended to c.* 27 *of* 1938, *s.* 10B, *sub-s.* 6 (*a*).

By s. 10B, sub-s. 6 (*a*), of the Copyright Amendment Act, 1931, as amended in 1938: "In respect of public performances by "means of any radio receiving set or gramophone in any place "other than a theatre which is ordinarily and regularly used for "entertainments to which an admission charge is made, no fees, "charges or royalties shall be collectable from the owner or user "of the radio receiving set or gramophone, but the Copyright "Appeal Board shall, so far as possible, provide for the collection "in advance from radio broadcasting stations or gramophone "manufacturers, as the case may be, of fees, charges and royalties "appropriate to the new conditions produced by the provisions "of this subsection and shall fix the amount of the same . . . ."

Held, that the effect of sub-s. 6 (*a*) of s. 10 B is to enact that a person who gives a public performance by means of any radio receiving set or gramophone in any place (other than a theatre as defined) need not pay anything for the right to do so. The exoneration of such owners or users in the specified circumstances is absolute, unqualified and unconditional, and such a public performance is a lawful act and no infringement of copyright. Further, the statutory right to perform conferred by the sub-section is in no way conditional on payment of the charges which the sub-section enacts are to be payable by broadcasting stations or gramophone manufacturers.

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* *Present:* VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD PORTER and LORD SIMONDS.

Accordingly, where an electrically operated gramophone, owned by the first appellants and rented to the second appellants, in whose restaurant it was placed, performed, on the insertion of a coin by a customer, a musical selection the copyright in which was owned by the respondent performing right society, the second appellants, as users of the gramophone, came within the provisions of the sub-section, while the first appellants had no need to claim to be protected by it, since they neither gave nor authorized the public performance of the record, having no control over the use of the machine in the restaurant.

Order of the Supreme Court of Canada [1943] S. C. R. (Can.) 348, discharged.

APPEAL (No. 60 of 1943), by special leave, from a judgment of the Supreme Court of Canada (May 4, 1943) which affirmed, with a variation, a judgment of the Exchequer Court of Canada (July 21, 1942) which had granted an injunction against the appellants in respect of the public performance on a gramophone of a musical composition on the ground that the appellants would thereby infringe the respondent's copyright.

The following facts are taken from the judgment of the Judicial Committee: The present respondent, the Canadian Performing Right Society, Ld., (hereinafter referred to as the society) was a company incorporated under the laws of the Dominion. It carried on in Canada the business of acquiring copyrights in dramatico-musical and musical works or performing rights therein, and dealt with or in the issue or grant of licences for the performance in Canada of such works. It owned the copyright in a musical composition called "Star Dust." On June 19, 1941, the society commenced an action in the Exchequer Court against the present appellants, alleging that they had (in the circumstances hereinafter mentioned) infringed the society's copyright in "Star Dust," and claiming an injunction restraining the defendants and each of them from publicly performing or authorizing the public performance of "Star Dust," and from installing or permitting the installation in any place of a device adapted publicly to perform "Star Dust." The circumstances in which the public performance took place, which constituted the alleged infringement of copyright, were as follows. The defendants to the action (the appellants before the Board) were (1.) the members of a partnership firm called Vigneux Brothers (hereinafter referred to as Vigneux), and (2.) Rae Restaurants, Ld. (hereinafter referred to as Raes). The business of Vigneux consisted in installing and providing service for electrically operated gramophones, which on the insertion of a coin performed musical selections from one or other of the records placed therein. Raes were the owners of a restaurant on the Lake Shore Boulevard, near the City of Toronto. Raes had one of those gramophones in their restaurant, which they hired from Vigneux for a payment of $10 a week. Two representatives of Vigneux attended at the end of each week to receive the $10, and to change the records as required. Any surplus takings beyond $10 were retained by Raes, who would, however, be liable to make up the $10 in the unlikely event of a deficiency. The gramophone might be operated by anyone, and, as might be expected, was mainly operated by patrons of the restaurant, by inserting a five, ten, or twenty-five cent coin therein according to the number of tunes desired. On May 21, 1941, a customer in the restaurant inserted a five cent coin with the result that " Star Dust " was performed on the gramophone. Among the listeners was a representative of the society, with the result that this litigation was commenced by the society in the Exchequer Court of Canada, claiming an injunction as stated above.

The question turned on the construction of the relevant Canadian copyright legislation [see the judgment of the Judicial Committee], and in particular on sub-s. 6 (*a*) of s. 10B of the Copyright Amendment Act, 1931, as amended in 1938 [set out in the head-note].

The trial judge (Maclean P.) granted the respondent an injunction as claimed. An appeal by the appellants to the Supreme Court of Canada (Duff C.J.C., Rinfret, Davis, Kerwin and Taschereau JJ.) was dismissed, except that the judgment of the Exchequer Court was modified by limiting the injunction to performances in public, or authorizing performances in public, of " Star Dust."

1944. Nov. 28, 29, 30. *Samuel Rogers K.C.* (of the Canadian Bar) and *Gahan* for the appellants. This is a test case, and the question for consideration arises out of special copyright legislation which is peculiar to Canada. [Reference was made to the history of Canadian copyright legislation and to the amendments thereto up to c. 27 of 1938.] The whole of this case revolves round sub-s. 6 (*a*) of s. 10B of the Copyright Amendment Act, 1931, as amended in 1938. The words "and shall "fix the amount of the same" in sub-s. 6 (*a*) impose on the Copyright Appeal Board an absolute duty of fixing the amount of the fees to be paid by radio broadcasting stations and gramophone manufacturers. Under sub-s. 6 (*a*) the owners and users have the right to perform the society's works without payment, and it (the society) is to be recompensed by the fees fixed by the Copyright Appeal Board. It is an alternative or substituted charge which Parliament has created as compensation to the society for the right of owners and users to perform without payment of fees. There is no mention of licences in sub-s. 6 (*a*). When the amount has been fixed by the board there must be an implied licence in favour of the appellants under this subsection, and the point is whether or not any licence is to be implied, whether or not the board has fixed the amount of the fees. In this case no amount had in fact been fixed by the board. The rights of the appellants, however, should not be contingent on the Copyright Appeal Board doing or not doing something which it is required to do, and it is an irresistible conclusion that the appellants are implied licencees under the sub-section, or, rather, have the right to perform in public without payment of a fee. These appellants are respectively the owners and users within the meaning of sub-s. 6 (*a*). It was said by Maclean P., and by the Chief Justice in the Supreme Court, that the two appellants are partners in a business of publicly performing musical compositions and are outside sub-s. 6 (*a*), which, they said, had no application to this particular type of user. The first appellants are not the partner or "virtual partner" of the other appellants in such a business, or in any other business. Assuming, however, that they are partners in a profit-sharing scheme, they are still, nevertheless, owners and users respectively of this machine, and still come within the exemption conferred by the sub-section. That they are performing for profit is no answer. Parliament must be assumed to have covered all the exceptions it intended by its reference to performances in theatres. The sole guide to the interpretation of a statute must be the statute itself: *Salomon* v. *Salomon & Co.* (1). By their decision, Maclean P. and the Chief Justice have contradicted the express words of the statute. If the right to collect fees as against the appellants has been taken away by statute, and the judgment of Rinfret J. is correct, and a right of injunction remains, the result is that by means of the injunction the respondent society will be enabled to collect fees, whereas the statute provides that no fees are payable. The object of the injunction must be to force these users to pay a fee. The playing of the gramophone record of "Star Dust" in the circumstances complained of was, by virtue of sub-s. 6 (*a*) of s. 10B of the Copyright Amendment Act, not an infringement of copyright, and the appellants are within the class of persons protected by the sub-section.

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(1) [1897] A. C. 22, 29.

Gahan followed.

Harman K.C. and *Lloyd-Jacob* for the respondent. There is no authority on the question at issue. The sole contention now for the appellants is that the right to use the respondent's property without payment has been given by statute. [The copyright legislation before the amendment in 1938 was examined.] If it had been intended to make something which before was an infringement not thereafter an infringement, the natural way would have been to have amended s. 17 of the principal Act of 1921. Section 22 of that Act shows that there can be a remedy by injunction when there is no other remedy. The appellants are exactly within s. 26 of the Act of 1921—they have, without the respondent's written consent, proposed to perform in public for private profit a musical composition of which the copyright subsists in Canada. What the legislature wished and intended to protect in 1938 was the small user, not people in the position of the appellants. Sub-section 6 (*a*) is misconceived by the appellants. That sub-section is not confined to performing right societies, but is a perfectly general provision. It is put in where it is because there is a duty in it on the Copyright Appeal Board, which was the creation of s. 10B of the Act of 1936. There is in sub-s. 6 (*a*) no reference to a society. It is quite a different scheme, and had nothing to do with licences for performance. It is for licensing instruments; it is the gramophone manufacturer who has to pay the fee. He could frank instruments sold for use for public performances. That would appear to be an ingenious scheme of the legislature for avoiding all difficulties. Here, however, no fee has in fact been fixed by the Copyright Appeal Board for payment by the manufacturer, and, accordingly, no payment having been made the performance was an infringement of the respondent's copyright. Statutory rights cannot be taken away except by words as clear as those giving them. There is nothing in the Copyright Act, as amended by the Copyright Amendment Act, 1931, and further amended by c. 28 of 1936, and c. 27 of 1938, which debars the respondent from obtaining the usual remedies for an infringement of its copyright, except the payment or tender of an approved fee. The acts of the appellants now complained of are not entitled to the protection given by sub-s. 6 (*a*) of s. 10B. of the Act of 1931.

Lloyd-Jacob followed.

Samuel Rogers K.C. replied. The argument as to the suggested franking of gramophones breaks down when applied to radio receiving sets. The idea would be unworkable, and in any event the words of the sub-section are " In respect of " the public performances by means of *any* radio receiving set " or gramophone . . . ." If the construction of the sub-section for which the appellants contend is right, and owners and users are exempt from payment of fees, and therefore from actions against them, it is immaterial whether the sub-section applies only to performing right societies or to others also. Lastly, if the performance which the patron who inserted the coin gave was a lawful performance, then anything that either of the appellants may have done was merely authorizing a lawful act and gave no cause of action.

1945. Jan. 18. The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN. This appeal, by special leave, from the Supreme Court of Canada, raises a difficult question under the Canadian copyright legislation. The Supreme Court affirmed a decision in favour of the present respondent which had been pronounced by the Exchequer Court, although, as will hereafter appear, the reasons for such affirmation were not unanimous. [His Lordship stated the facts and continued :] These being the circumstances in which the performance (the publicity of which is not in dispute) of " Star Dust " took place, their Lordships now proceed to consider the relevant legislation for the purpose of considering whether Vigneux and Raes, or either of them, have infringed the society's copyright.

The rights of an owner of a copyright in Canada are purely statutory, and are governed by the Copyright Act as amended from time to time. The original Act was enacted in 1921. It came into force in 1924, and was very similar in its provisions to the Copyright Act of this country. Its 44th section enacted that no person should be entitled to copyright or any similar right in any literary, dramatic, musical or artistic works otherwise than in accordance with the provisions of that Act, or of any other statutory enactment for the time being in force. After sundry amendments (irrelevant to this case) it appeared as c. 32 of the Revised Statutes of Canada, 1927. Down to that time no provisions existed therein in regard to those associations (such as the society) which may be conveniently termed performing rights societies. But in 1931 the Canadian legislature apparently deemed it necessary to introduce legislation dealing with the powers which performing rights societies possessed of controlling public performances of musical and dramatico-musical works. Such legislation was first introduced in 1931, and was amended in 1935, 1936, and 1938. It is on a provision which was introduced in 1938 that this appeal turns, but references must be made to the earlier legislation.

By the Act of 1931 (s. 10) a performing rights society had to file with the Minister (*a*) lists of all dramatico-musical and musical works in respect of which it claimed authority to grant licences to collect fees, charges or royalties for the performance thereof in Canada, and (*b*) statements of all fees, charges or royalties which the society proposed to collect in compensation for the grant of licences for the performance of such works in Canda. If (after an investigation and report by a commissioner) the Minister was of opinion that a performing rights society unduly withheld the grant of licences, or proposed to collect excessive fees, charges or royalties, " or otherwise " conducts its operations in Canada in a manner which is " deemed detrimental to the interests of the public," then the Governor in Council, on the recommendation of the Minister, might from time to time revise or otherwise prescribe the fees, charges or royalties which any such society might lawfully sue for or collect. No such society might sue for or collect any fees, charges or royalties (1.) for licences for the performance of any works not specified in the filed lists, or (2.) in excess of those specified in the filed statements, nor of those revised or otherwise prescribed by order of the Governor in Council. By the Act of 1935, two sub-sections were added to the above-mentioned s. 10. It is unnecessary to refer to them because by the Act of 1936 the said s. 10, as amended by the Act of 1935, was repealed, and four sections were substituted therefor, namely, ss. 10, 10A, 10B and 10C. The last-mentioned section was a provision of a temporary nature, but ss. 10, 10A and 10B (so far as relevant) are in the following terms :—

" 10. (1.) Each society, association or company which carries " on in Canada the business of acquiring copyrights of " dramatico-musical or musical works or performing rights " therein, and which deals with or in the issue or grant of " licences for the performance in Canada of dramatico-musical " or musical works in which copyright subsists, shall, from time " to time, file with the Minister at the Copyright Office lists of " all dramatico-musical and musical works, in current use in " respect of which such society, association or company claims " authority to issue or grant performing licences or to collect " fees, charges or royalties for or in respect of the performance " of its works in Canada.

" (2.) Each such society, association or company shall, on or " before the first day of November, one thousand nine hundred " and thirty six, and, thereafter, on or before the first day of " November in each and every year, file, with the Minister at " the Copyright Office statements of all fees, charges or royalties " which such society, association or company proposes during " the next ensuing calendar year to collect in compensation " for the issue or grant of licences for or in respect of the " performance of its works in Canada.

" (3.) If any such society, association or company shall " refuse or neglect to file with the Minister at the Copyright " Office the statement or statements prescribed by the last " preceding sub-section hereof, no action or other proceeding " to enforce any civil or summary remedy for infringement " of the performing right in any dramatico-musical or musical " work claimed by any such association, society or company " shall be commenced or continued, unless the consent of the " Minister is given in writing.

" 10A. (1.) As soon as practicable after the receipt of the " statements prescribed by sub-section two of the last preceding " section, the Minister shall publish them in the Canada " Gazette and shall notify that any person having any objection " to the proposals contained in the statements must lodge " particulars in writing of his objection with the Minister at the " Copyright Office on or before a day to be fixed in the notice, " not being earlier than twenty-one days after the date of " publication in the Canada Gazette of such notice.

" (2.) As soon as practicable after the date fixed in said " notice as aforesaid the Minister shall refer the statements " and any objection received in response to the notice to " a Board to be known as the Copyright Appeal Board.

" 10B. (1.) The Copyright Appeal Board shall consist of " three members, who shall be appointed by the Governor in " Council.

* * * *

" (6). As soon as practicable after the Minister shall have " referred to the Copyright Appeal Board the statements of " proposed fees, charges or royalties as herein provided and " the objections, if any, received in respect thereto, the Board " shall proceed to consider the statements and the objections, " if any, and may itself, notwithstanding that no objection " has been lodged, take notice of any matter which in its " opinion is one for objection. The Board shall, in respect " of every objection, advise the society, association or company " concerned of the nature of the objection and shall afford " it an opportunity of replying thereto.

" (7.) Upon the conclusion of its consideration, the Copyright " right Appeal Board shall make such alterations in the statements " ments as it may think fit and shall transmit the statements " thus altered and revised or unchanged to the Minister " certified as the approved statements. The Minister shall " thereupon as soon as practicable after the receipt of such " statements so certified publish them in the Canada Gazette " and furnish the society, association or company concerned " with a copy of them.

" (8.) The statements of fees, charges or royalties so certified " as approved by the Copyright Appeal Board shall be the " fees, charges or royalties which the society, association or " company concerned may respectively lawfully sue for or " collect in respect of the issue or grant by it of licences for the " performance of all or any of its works in Canada during the " ensuing calendar year in respect of which the statements " were filed as aforesaid.

" (9.) No such society, association or company shall have " any right of action or any right to enforce any civil or summary " mary remedy for infringement of the performing right in " any dramatico-musical or musical work claimed by any " such society, association or company against any person " who has tendered or paid to such society, association or

" company the fees, charges or royalties which have been " approved as aforesaid."

It will be noticed that the obligation to file lists of works and statements of proposed charges remains, but (a new provision) if a performing rights society refuses or neglects to file the prescribed statements it can only enforce any remedy for infringement if the consent of the Minister is given in writing. A new body, the Copyright Appeal Board, is constituted with power to revise and alter the proposed statements, and certify the statements in their ultimate form as approved statements. The charges so certified are the charges which the society may lawfully sue for or collect, and no society has any right of action, or any right to enforce any remedy for infringement of a performing right in any dramatico-musical or musical work, against any person who has tendered or paid to that society the approved charges.

Down to this point, and, indeed, until June 24, 1938, the regulation of the powers of performing rights societies which the Canadian legislature had deemed necessary or advisable in the interests of the public had taken the form of compelling such societies to publish lists of the dramatico-musical and musical works in respect of which they owned the performing rights, to publish statements of their proposed charges in respect of the performance of their works, and to submit to those charges being altered or revised by a revising authority, being in 1936 the Copyright Appeal Board created by the Act of that year. In addition the societies were subjected to the provisions of s. 10, sub-s. 3, and s. 10B, sub-s. 9.

In 1938 an amendment Act of that year was passed which, according to its wording, produced " new conditions." It came into operation on June 24, 1938, and enacted (by s. 3) that the Copyright Amendment Act, 1931, as amended by the Act of 1936 and by that Act should be read and construed with and as part of the Copyright Act, and (by s. 4) that s. 10B, hereinbefore set forth, be amended by adding thereto as sub-s. 6 (*a*) the following :—" (6.) (*a*) In respect of public " performances by means of any radio receiving set or gramo- " phone in any place other than a theatre which is ordinarily " and regularly used for entertainments to which an admission " charge is made, no fees, charges or royalties shall be collect- " able from the owner or user of the radio receiving set or " gramophone, but the Copyright Appeal Board shall, so far " as possible, provide for the collection in advance from radio "broadcasting stations or gramophone manufacturers, as "the case may be, of fees, charges and royalties appropriate "to the new conditions produced by the provisions of this "sub-section and shall fix the amount of the same. In so "doing the Board shall take into account all expenses of "collection and other outlays, if any, saved or saveable by, "for or on behalf of the owner of the copyright or performing "right concerned or his agents, in consequence of the provisions "of this sub-section."

It is to be observed that the new conditions are of limited application. They apply only in respect of public performances by means of radio receiving sets or gramophones in places which are not theatres which answer to the description contained in the sub-section. It is further to be noted that a duty is cast on the board to fix an amount to be paid by broadcasting stations or gramophone manufacturers and, so far as possible, to provide for its collection in advance. The amount so to be fixed is, apparently, an amount to be fixed by the board on its own initiative, not, as in other cases, a sum proposed in a filed statement for the board's consideration and approval. The new sub-section is accordingly appropriately inserted between sub-ss. 6 and 7, the two sub-sections which cover the time during which the board will be engaged in considering the statements already submitted for its approval.

Some further facts must now be stated. The approved statement of the society in relation to 1941 included no fee for performance by means of gramophones, although the society had, in fact, in its filed statement provided for an annual licence fee in respect of gramophones, including all mechanical instruments other than radio, of $7 for each instrument. The approved statement did, however, contain an amount fixed under sub-s. 6 (*a*) in relation to receiving sets, namely, a sum of 1,000*l.* to be apportioned among the different broadcasting stations in Canada as therein mentioned. Before the enactment of sub-s. 6 (*a*) a tariff of $10 per machine for a one-year licence had been approved by the board in respect of the type of machine here in question.

The main point at issue between the parties can now be stated. It resolves itself into a question of the true construction of the new sub-section. The rival contentions are these :—The appellants say that the effect of the sub-section is to enact that from and after June 24, 1938, a person who gives a public performance by means of any radio receiving set

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or gramophone in any place (other than a theatre as defined) may do so without paying anything for the right to do so, with the result that the playing of "Star Dust" in the circumstances before mentioned was, by virtue of s. 10B, sub-s. 6 (*a*), not an infringement of copyright. The society, on the other hand, contends that the sub-section has no such effect; that it merely provides that in future the persons who give public performances by means of radio receiving sets or gramophones in any place (other than a theatre as defined) are not the people to be licensed, but that the persons who have to be licensed, in order that such a performance may not be an infringement of copyright, are the broadcasting stations or gramophone manufacturers, with the result that since the manufacturer of the gramophone in question had made no payment (no amount having been, in fact, fixed by the board) the playing of "Star "Dust" in the circumstances before mentioned was an infringement of copyright by the appellants. Other subsidiary points were argued, and will be dealt with later. The main contention, however, was as stated.

In the Exchequer Court the late President granted the injunction asked for in the statement of claim. His judgment was mainly based on the view that the defendants did not "fall within the class protected by sub-s. 6 (*a*) of s. 10B." He had previously stated in his judgment that he was satisfied that the idea prompting the enactment was to obviate the collection of fees "in cases where the user [of the gramophone] "was in a small and rather inconsequential way, and where "any direct or incidental profit from such user was small, if "any at all"; but he excluded the defendants from the protected class on the ground that they were "virtually "partners" in a venture of publicly performing musical works purely for profit. He also stated that "s. 10B does not purport "to take from the owner of a musical work the right to restrain "infringement of his copyright where no licence has been "granted, or where no definite provision has been made for "compensation to the owner for the right to perform his "musical work."

The defendants' appeal to the Supreme Court was dismissed, but the injunction was modified by being limited to the public performance of "Star Dust" or the authorization thereof. Sir Lyman Duff (then Chief Justice of Canada) delivered a judgment in which Davis J. concurred. The Chief Justice traced the history of the special legislation dealing with

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performing rights societies which before the enactment of sub-s. 6 (*a*) had qualified their sole right to perform any particular musical composition in public by vesting in everybody who paid or tendered to the society the notified fee, charge or royalty the right to perform it, a right which the Chief Justice describes as a statutory licence. The legislature however, he said, considered that this plan did not sufficiently protect purchasers of gramophone records and possessors of wireless receiving sets in view of decisions as to the meaning of " public preformance " and other uncertainties as to the law, and accordingly the special provision of sub-s. 6 (*a*) was enacted, dealing with the owners of gramophones and wireless receiving sets and the use of these instruments in places other than a theatre, as defined. He construed the sub-section in accordance with the contention of the appellants. " It declares," he said, " in unqualified terms that no fee, charge or royalty " is to be exacted from the owner of a gramophone record or " radio receiving set in the circumstances specified, and com- " pensation is provided in the duty imposed on the board to " make such provision as appears to be appropriate and " possible in the circumstances " (1). There was no discretion vested in the board in respect of the exaction of fees, charges and royalties from the owners of gramophones or receiving sets ; " that is settled by the statute, which in the plainest " terms forbids it " (2). He treats the sub-section as implicitly conferring on the owners and users of gramophones and receiving sets in the defined conditions what he calls a " statutory licence " for public performance by these instruments which is in no way conditional on the actual payment of fees prescribed by the board and payable by gramophone manufacturers or broadcasting stations. The Chief Justice, however, concurred in dismissing the appeal on the ground indicated by the President, namely, that the appellants were not within the protection of sub-s. 6 (*a*) because they were carrying on together, under arrangements in the nature of a partnership, a business of publicly performing musical compositions and dramatico-musical compositions by means of gramophones. " I do not think," he said, " the objects of the " legislation, as disclosed by the legislation itself, embrace the " protection of people engaged in the business in which the " appellants are engaged " (3).

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(1) [1943] S. C. R. (Can.) 355.
(2) Ibid. 356.
(3) Ibid. 357.

Rinfret J. (now the Chief Justice of Canada) took a different view as to the construction of the sub-section, and his judgment was concurred in by Kerwin and Taschereau JJ. He refers to sub-s. 6 (*a*) as enacting " that the fees, charges or royalties to " which the society . . . . holding the copyright is entitled " shall not be collectable from the owner or user of the " gramophone (or, in the present instance, from Vigneux " Brothers, the owners of the gramophone . . . . and from " Rae Restaurants, Ld., the user thereof) ; but such " fees, charges or royalties are collectable in advance " from the gramophone manufacturers. When once those " fees, charges or royalties have been paid by the gramophone manufacturers, the owner or user of the gramophone " may publicly perform the musical work ; and no fees, charges " or royalties shall be collectable from such owner or user of " the gramophone " (1). He then proceeds to state that the rights of the copyright holder remain unaffected where the appropriate fee has not been paid by the gramophone manufacturer, that the society has filed its statement of fees, that it is to no purpose to argue that the board has not provided for the collection in advance from the gramophone manufacturers. He added that no fee, charge or royalty had been paid by the appellants " or for them," and that the appellants, therefore, had not acquired the performing right. The society was therefore entitled to an injunction against infringement.

Their Lordships, after consideration of the case, which was admirably argued before them by both sides, find themselves in agreement with the construction of the sub-section for which the appellants contended. They agree with the view of Sir Lyman Duff that the sub-section declares in unqualified terms that in the specified circumstances no charge of any kind is to be collected (i.e., exacted) from the owner or user of a radio receiving set or gramophone, compensation to the performing rights society being provided by the appropriate charges, the amount of which the board has a duty to fix, although as already indicated, their Lordships do not, as at present advised, share his view that the words " so far as possible " qualify that duty in any respect except as regards making provision for collection in advance. They agree, however, with him also in the view that what he terms the statutory licence (or, in other words, the statutory right to perform) which the sub-section confers is in no way conditional on payment of the charges which the sub-section enacts are to be payable by broadcasting stations or gramophone manufacturers. Indeed, such a condition would, far from relieving the owners of receiving sets or gramophones from uncertainties, only add to their doubts and perplexity. The exoneration of owners or users of receiving sets and gramophones from all payments in respect of public performances of musical compositions by means of those instruments in the specified circumstance is absolute, unqualified and unconditional, and, in their Lordships' opinion, must necessarily carry with it the consequence that as from the date of the coming into operation of the sub-section, such a public performance was a lawful act and no infringement of copyright.

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(1) [1943] S. C. R. (Can.) 365.

The present Chief Justice appears to read the sub-section as if it merely shifted the fees payable from the owners or users of the instruments to the broadcasting stations and the makers of gramophones. He even alludes to the fact that in this case no fees "had been paid by the appellants or *for them.*" He seems to their Lordships to give insufficient weight to the actual wording of the sub-section, which starts off with a complete exoneration from any payment of the owners or users of the instruments which give the public performance, and gives by way of compensation to the owners of the right of performance a different payment, namely, an amount to be fixed by the board and to be paid by the broadcasting stations or gramophone makers.

So far, their Lordships have construed the sub-section as entitling those persons who are within its scope to give public performances by means of any radio receiving set or gramophone in any place other than a theatre as defined without paying anything for the right to do so, and without thereby infringing copyright. It remains to consider whether Raes and Vigneux, or either and which of them, come within the provisions of the sub-section. In their Lordships' opinion Raes do, as being the users of the gramophone by means of which a public performance of "Star Dust" was given in a place other than a theatre as defined. From another point of view it may be said that the customer, who is no party to these proceedings, was the user. But the point is immaterial, since their Lordships feel no doubt that Raes, who hired the instrument and had it placed in their restaurant in order to attract customers, who enjoyed a combination of food and music, used the instrument as a means whereby public performances of "Star Dust" and other musical compositions were given. In regard to

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Vigneux, no doubt in law they are the owners of the gramophone. As such they might, if necessary, claim to be protected by the sub-section, but in their case no such claim is necessary, because, as their Lordships think, they neither gave the public performance of " Star Dust," nor did they authorize it. They had no control over the use of the machine ; they had no voice as to whether at any particular time it was to be available to the restaurant customers or not. The only part which they played in the matter was, in the ordinary course of their business, to hire out to Raes one of their machines and supply it with records, at a weekly rental of ten dollars.

Their Lordships are unable to accept the view of the President (accepted by Sir Lyman Duff and Davis J.) that Raes and Vigneux were carrying on " a distinct class of business, a venture " of publicly performing musical works purely for profit." They can see no foundation on which such a view can be based. As stated above, Raes hired a machine which they thought would attract custom to their restaurant. Vigneux supplied the machine in the ordinary course of their business, at a fixed rental ; they had no interest beyond that. To hold, on those materials, that " they are virtually partners in a distinct class " of business," and to decide the case on that ground, cannot, in their Lordships' opinion, be justified.

Some subsidiary points must be referred to. Counsel for the society pointed to the provisions in the Copyright Act and the amending Acts which enacted in specific terms that certain acts should not constitute infringement, the Act of 1938 itself containing one such provision, and argued that if sub-s. 6 (*a*) bore the meaning for which the appellants contended, one would expect to find a provision to the effect that the public performances contemplated by the sub-section should not constitute infringement. While at first sight there is force in this argument, it loses it when one realizes that on the society's construction of the sub-section, inasmuch as the Copyright Appeal Board has fixed an amount to be paid by broadcasting stations, a public performance by means of a receiving set in a place other than a theatre as defined would not be an infringement. Nevertheless, no specific provision to that effect is to be found. It was also contended that it was necessary to find express or clear words depriving the society of rights, and that the wording of the sub-section was not sufficiently clear for that purpose. Their Lordships agree with Sir Lyman Duff that the words are clear ; and they would

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also point out that the sub-section provides (by way of compensation) for the payment of an appropriate sum payable "in advance," which, apparently, means in advance of any public performance, and therefore payable whether or not a public performance does in fact take place. Finally, it was suggested that there was nothing in the legislation to deprive the society of its rights to an injunction, which was the only relief claimed in the action. If, however, the public performance here in question was made a lawful act by the sub-section, and no infringement, the claim to an injunction necessarily fails.

For the reasons indicated, their Lordships are of opinion that this appeal should succeed, the orders of the Supreme Court and the Exchequer Court should be discharged, and an order made dismissing the action, with costs in both courts, and they will humbly advise His Majesty accordingly. The respondent must pay the costs of the appeal to His Majesty in Council.

Solicitors for appellants: *Charles Russell & Co.*
Solicitors for respondent: *Syrett & Sons.*

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Mar. 7.

[PRIVY COUNCIL.]

PART CARGO ex M.V. GLENROY.

H.M. PROCURATOR-GENERAL . . APPELLANT;
AND
M. C. SPENCER, CONTROLLER OF MITSUI & COMPANY, LIMITED . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE DIVORCE AND ADMIRALTY DIVISION (IN PRIZE).

Shipping—Prize—Cargo—Pre-war contract—Neutral shipper—Irrevocable letter of credit—Refusal of bank to accept draft—Documents not taken up—Cancellation of contract—No passing of property—Enemy house of trade—Enemy goods—Locus pœnitentiæ.

A Japanese company, carrying on business in Japan, had branches in London and Hamburg. The business in Germany was later incorporated there, but the whole of the shares in the German company were owned by the Japanese company and their trustees, and, in addition, the German company was controlled and staffed by, and was entirely dependent on, the Japanese company, being really a purchasing and selling house of that company. A contract, made before the outbreak of war in 1939, for the sale of goods by the Japanese company to the German company stipulated, inter alia, Hamburg as the destination, the price per ton, c.i.f. Hamburg, and that payment was to be by a three months sight draft against a letter of credit on a bank. An irrevocable letter of credit was duly issued by the Hamburg branch of the bank (a Japanese company) to the Japanese company, authorizing them to draw on the London branch of the bank at three months for account of the German company for the price of the goods. The letter contained instructions that the bills of lading, drawn in triplicate, were to be made out to the order of the bank, and the invoices and insurance, in triplicate, in the bank's name or in that of the shipper and blank endorsed. Two sets of documents were to be sent to the bank at Hamburg, and one set, with drafts on London attached, was to be delivered to the bank in London against acceptance of the drafts. The goods were shipped in Japan on the M.V. *Glenroy*, a British vessel, and bills of lading issued, invoices prepared and insurance taken out on July 31, 1939, in accordance with those instructions.

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* *Present:* LORD MACMILLAN, LORD WRIGHT, LORD PORTER, LORD SIMONDS and LORD GODDARD.

On August 7, 1939, the Japanese company drew a bill in accordance with the credit, negotiated it through a Japanese branch of the bank, which delivered three sets of the documents as arranged. The set sent to London was received on September 13, 1939, and owing to the outbreak of war the draft was not accepted nor the documents taken up. On September 13, 1939, the German company cancelled the contract unconditionally. Meanwhile the *Glenroy* had been diverted to Liverpool, where she arrived on October 17, 1939, and there, on November 2, the goods were seized as prize. On a claim by the Crown that the goods were enemy property or contraband of war, and as such liable to condemnation :—

Held, first, and assuming that the Japanese and German companies were separate entities capable of contracting with one another, that there was nothing which differentiated the contract from an ordinary c.i.f. contract, and therefore, the draft not having been accepted or the documents taken up, the property in the goods had not passed to the German company so as to become enemy property.

Held, secondly, that the German company, though in one sense a separate entity, being separately incorporated, was in substance a branch of the Japanese business, where the control lay, and constituted an enemy house of business of that company, and that the goods, at the outbreak of war, were the concern of the Hamburg branch rather than of the company in Japan and were accordingly enemy property within the principle laid down in *The Anglo-Mexican* [1918] A. C. 422, and the Japanese company having taken no steps to discontinue, or dissociate itself from, the enemy branch, the taint of enemy ownership was not removed, and the goods were liable to condemnation.

Daimler Company, Ld. v. *Continental Tyre & Rubber Company (Great Britain), Ld.* [1916] 2 A.C. 307, *The Anglo-Mexican* [1918] A.C. 422, and *The Lutzow* [1918] A.C. 435, referred to.

Decree of the Prize Court [1944] P. 11, set aside.

APPEAL (No. 48 of 1944) by H.M. Procurator-General against a decree (December 21, 1943) of the President of the Admiralty Division sitting in Prize dismissing the claim of the Crown that a part cargo of 2,240 bags of Nagauzura beans ex M.V. *Glenroy* was enemy property or contraband of war and liable to condemnation.

The following facts are taken from the judgment of the Judicial Committee :

The beans were shipped from Otaru, in Japan, for carriage to Hamburg in the following circumstances. There was in Japan a corporation known as Mitsui Bussan Kabushiki Kaisha (hereinafter called "Mitsui") which carried on business in that country and had a branch in London (registered under the Companies Acts as a branch) called Mitsui & Company, Limited (hereinafter referred to as Mitsui, London). Mitsui had since 1910 also carried on a business in Germany, originally at Hamburg through a branch office, and in 1926 that business was incorporated in that country. To that company were transferred the assets, business and staff employed in Germany, and in 1928 the head office was transferred to Berlin, but Hamburg continued as a branch office of the German company. The whole of the shares in that company were owned by Mitsui and their trustees. In addition, it was controlled and staffed by Mitsui and was entirely dependent on that company. It was really a purchasing and selling house of Mitsui, just as were Mitsui's branches elsewhere, and according to a declaration made by Mitsui's manager, although it might be considered as a German company by reason of its being incorporated in Germany according to German law, yet, without the slightest doubt, it was for all practical and business purposes considered, even in Germany, as a branch office of a foreign company.

Mitsui had also a branch at Otaru, in Japan, and by a purchase note dated July 10, 1939, and by a sale note dated July 11, 1939, Mitsui (Hamburg) confirmed the purchase and Mitsui (Otaru) the sale of the beans, the subject-matter of the present claim. Amongst the terms agreed on were : Shipment, July : destination, Hamburg : price 17*l.* 0*s.* 0*d.* per ton c.i.f. Hamburg : Otaru to draw at three months sight against a letter of credit on a bank to be named later. That bank was, by August 5, identified as the Yokohama Specie Bank, and a letter of credit was duly issued by the Hamburg branch of that bank to Otaru, authorizing them to draw on the London branch at three months for account of Mitsui (Hamburg) for the price of the beans. That letter contained instructions that the bills of lading, drawn in triplicate, were to be made out to the order of the Yokohama Specie Bank, Ld., and the invoices and insurance policy, in triplicate, in the bank's name or in the name of the shipper and blank endorsed. Two sets of documents were to be sent to the bank at Hamburg, and one set, with drafts on London attached, to be delivered to the bank in London against acceptance of the drafts. The drafts were to be drawn and negotiated before August 15, and to contain the clause " Drawn under letter of credit D.C. No. 7766 dated Hamburg, " 5th August, 1939." The letter was headed with the words " Drafts drawn under this letter of credit are negotiable " through Yokohama Specie Bank, Ld. only," and ended " We hereby agree with the drawers, endorsers and bona fide " holders of drafts drawn in accordance with the terms and " conditions of this credit that such drafts shall be honoured " on presentation at our office in London, provided they are " negotiated through the Yokohama Specie Bank, Ld."

The goods were shipped and bills of lading issued, invoices prepared and insurance taken out on July 31, 1939, in accordance with those instructions. The bills of lading acknowledged shipment on board the M.V. *Glenroy* and were for delivery at Hamburg unto order of the bank : the invoices stated that the goods were shipped by order and for account of Mitsui (Hamburg), and the insurance policies covered them from Otaru to Hamburg, and appeared to have been issued under a general cover granted to the Otaru branch and to have been blank endorsed. On August 7, 1939, Mitsui drew a bill in accordance with the credit, negotiated it through the Otaru branch of the bank and advised the London branch of their action, ending with the words, " Drawn under L/C " No. 7766 Hamburg, 5th August, 1939." A letter to the same effect was sent to the bank's office in Hamburg. When negotiating the bill Mitsui delivered the three sets of documents to the Otaru branch of the bank, and on the same day two sets were sent to the bank at Hamburg and one, with the draft attached, to London, where it was received on September 13, 1939, and owing to the outbreak of war was not accepted or paid. Meanwhile, on September 3, war between Great Britain and Germany had broken out, and on September 13 Mitsui (Hamburg) telegraphed to Mitsui (Otaru) that they had cancelled the contract unconditionally as they saw no way of delivery or payment, and asked the Otaru branch to dispose of the goods as they thought best. On September 14, before receipt of that message, Mitsui (Otaru) had already telegraphed to Mitsui (London) instructing them to telegraph saleable price London or Rotterdam, and on the 16th Otaru cabled " Glenroy Nagauzura sale contract cancelled unconditionally. As to whereabouts and alteration destination consult Y.S.B. (Yokohama Specie Bank) London who hold documents."

Meanwhile, at some date unknown, the *Glenroy* had been diverted to Liverpool, where she arrived on October 17, 1939, and there on November 2 the beans were seized as prize. On that same day the London branch of the bank informed Mitsui (London) that the amount of the bill had been refunded, and that they were instructed to hand over the documents free of charge, but were unable to do so as they had forwarded them to H.M. Procurator-General. At the same time they wrote to that gentleman renouncing their claim in favour of Mitsui (London). On December 29, 1941, after the entry of Japan into the war, the respondent was, under the Trading with the Enemy Act, 1939, and the Defence (Trading with the Enemy) Regulations, 1940, appointed controller of the business of the London branch of Mitsui.

On June 12, 1942, the London branch filed a claim on behalf of Mitsui on the ground that the beans were at all material times the property of Mitsui. On March 2, 1943, the respondent entered an appearance as controller, and on March 12 filed a claim on behalf of himself as controller of the London branch, and on behalf of Mitsui, on the ground that he or the London branch, or Mitsui, was owner of the goods which, he wrote, had been shipped from Japan before the outbreak of war and were not at time of shipment, or at any material time, contraband. On April 22, 1943, the respondent was appointed by the Board of Trade to control the winding-up of the London branch, and it was agreed that he should be treated as claiming by virtue of that appointment. On that form of claim the appellant objected that the respondent could not be heard to represent Mitsui without the Royal Licence, and that objection was upheld by the President: the respondent, accordingly, appeared in this appeal only on behalf of himself and of the London branch.

1945. Jan. 30, 31; Feb. 1. *Sir Donald Somervell A.-G., J. V. Nesbitt* and *Devlin* for the appellant. There are three points: (*a*) That under the contract of sale the property in the goods had passed to the German company before the outbreak of war with Germany, and that in the circumstances of the case it was immaterial that the draft for the price of the goods was not accepted in accordance with the terms of the contract and letter of credit or at all. (*b*) Alternatively, that though the German company was, in law, a corporate entity separate from the Japanese company, its relationship with the Japanese company was such that the goods were the trade or concern of an enemy house of a neutral trader and condemnable even if the property was not in the German company. (*c*) Alternatively, that the goods being consigned to Hamburg and being seized in transit were condemnable as contraband. With regard to (*a*), the property in the goods passed to the German company before the outbreak of war either on shipment on July 31, 1939, or on delivery of the shipping documents by Mitsui to the Otaru branch of the bank on August 7, 1939. Inasmuch as the bills of lading were made out to the bank's order at Hamburg, and two sets of the shipping documents were sent direct to the bank, the bank, being for this purpose the agent of the German company, was enabled to obtain delivery of the goods on arrival at Hamburg. Further, having regard to the irrevocable letter of credit and to the fact that the draft had been negotiated by the bank, Mitsui had in effect received the purchase money, and thereafter had no reason for retaining, and did not in fact retain or intend to retain, any jus disponendi until the draft had been accepted by the bank, and such acceptance would not have afforded any additional security or benefit to Mitsui.

One unusual feature in this case is that the letter of credit provided that the drafts should be negotiated with a branch of the same bank in Japan. This is not a typical c.i.f. contract; it has a number of special features. It is a question in each case, depending on the circumstances, whether property

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passes—there is no one conclusive thing which always produces the same result. The points for emphasis on the documents are the form of the bill of lading—it was endorsed " Notify " to Deutsche Mitsui Bussan A.G. Hamburg "—the form of the invoice, which stated that the goods were shipped " by " order and for account of " the German company, and the form of the insurance. [Reference was made to ss. 16, 17 and 19 of the Sale of Goods Act, 1893.] " The passing of property " being a question of intention is ultimately a question of fact. " There is no evidence of the intention of these parties beyond " the inferences to be drawn from their situation and interests " and from the mercantile operations which they conducted ": *The Kronprinsessan Margareta* (1). That case sets out the general principles. There does not appear to be a case which covers a credit of the kind in this case, intended to be given to the seller. It is just as good as an acceptance—" I promise " to pay in three months." The letter of credit is consistent, and consistent only, with that view of the intention of the parties. If the two bills of lading had been sent to Mitsui, Hamburg, the respondent would not be here. The bills of lading were sent to Hamburg as the buyer's bank. The whole point of this transaction was to clear the seller out of the way by the letter of credit, and the buyer, through his bank, had complete control and could demand the bills of lading. [Reference was also made to *Gurney* v. *Behrend* (2), *Ex parte Banner. In re Tappenbeck* (3), and *Shepherd* v. *Harrison* (4) on the question of the passing of property, and on the question of credits to *The Lutzow* (5) and *The Kronprinzessin Cecilie* (6).] There are other authorities dealing with the general principles, but it is plain that the matter is one of intention. The terms here are unusual; a confirmed letter of credit in this form, with an express undertaking to the seller to accept the documents is an unusual feature. There appears to be no case which in any way approaches this. Admittedly it is not conclusive. Secondly, under the letter of credit two copies of the bill of lading are sent without conditions to the branch of the buyer's bank at Hamburg. Thirdly, the inserted provision that the drafts must be negotiated through the Yokohama Specie Bank results in the seller having no further interest in the goods or property as from that date.

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(1) [1921] 1 A. C. 486.

(2) (1854) 3 E. & B. 622.

(3) 1876) 2 Ch. D. 278, 288.

(4) (1871) L. R. 5 H. L. 116, 131.

(5) [1918] A. C. 435.

(6) (1915) 1 Br. & Col. P. C. 623.

As the second ground for condemnation, (*b*) (*supra*), reliance is placed on the principle laid down in *The Anglo-Mexican* (1) and *The Lutzow* (2) that when a neutral company has a trading branch in enemy territory so much of the business as is shown to be the concern of the branch is to be deemed enemy business, and goods involved in its transactions are to be condemned as if they were enemy goods. In such a case the failure after the outbreak of war to close the enemy branch justifies the condemnation of the goods even though they were shipped before the war. The relationship between Mitsui and the German company was such that the latter ought, for the purpose of the application of this principle, to be treated as a branch of Mitsui, and the consignment of the goods to the German company to be dealt with in Germany made the transaction the concern of the German company. The company in Germany, although a separate entity, was part of the Japanese organism; it is, in fact, managed by Mitsui. Once the goods are shipped they become part of the German business, in respect of which Mitsui is treated as having a commercial domicile in Germany. It was said in *The Anglo-Mexican* (1) that "A neutral owning or being " a partner in a house of business in an enemy country has " a commercial domicile in that country. This commercial " domicile imposes an enemy character on his property or " interest in such house of business," and he may " be properly " deemed an enemy in respect of his property or interest in " such business " (3). The only thing that would remove the taint of enemy character from such goods would be dissociation from the enemy. On the facts of this case Mitsui did not dissociate themselves from the German company. To get over the doctrine the enemy organization must be wound up. This is a case of enemy character. [Reference was also made to *The Manningtry* (4).]

The third ground for condemnation, (*c*) (*supra*), is that the goods were conditional contraband. Admittedly after September 3, 1939, the *Glenroy* was not going to carry the goods to Hamburg, but since on shipment they had that enemy destination, the respondent must show that the owner of the goods, or the person having control of them, took some step to alter the original destination. There was no, or no sufficient, evidence that such a step was taken. The cases on

(1) [1918] A. C. 422.
(2) [1918] A. C. 435.
(3) [1918] A. C. 425, 433.
(4) [1916] P. 329, 340.

this point, to which the President referred (1) have, it is submitted, to be applied so far as this case is concerned in the light of the doctrine of continuous voyage. It is a wrong, or at any rate a very far reaching, principle to say that the mere fact that the goods are on a British ship relieves them of their contraband taint without any evidence of design by the owner to abandon the enemy destination.

J. V. Nesbitt followed.

Sir Robert Aske K.C. and *Gething* for the respondent, were called on only on the house of trade point. Two questions arise, (*a*) whether that doctrine applies, in any case where there are two separate entities, as between the neutral on the one hand and his house of trade on the other; and (*b*) whether in the circumstances of the present case it can be said that these goods, within the meaning of the authorities, "appertained to" the neutral. As to (*a*), it is submitted that the doctrine does not extend to a separate entity, even if the separate entity was created by the action of the neutral trader and even though he owns all the shares and interest in the separate entity. [Reference was made to *The Lutzow* (2).] If the property remains in the neutral all the time there can be no contractual dealing between that neutral and his house of trade. When, however, there is an entirely separate entity they can contract with each other and pay money to each other. Property is the real criterion to the liability to seizure in prize, but where a person is carrying on business in two countries it is his property all the time. The position on the authorities is strong in favour of these goods being not in the Germany company but owned by the Japanese company. The difference between *The Anglo-Mexican* (3) and *The Lutzow* (2) is that in the former the Board were simply laying down broad general principles, and in the latter were applying those general principles to particular cases. There appears to be no case in which it has been necessary for the Board to lay down the precise limits within which the neutral can withdraw his house of trade. The principle of discontinuance or dissociation that has been laid down would mean that the neutral should withdraw himself and his capital from the enemy country. It is not suggested that that is impossible where the trading house is a separate entity, but it would be quite different in its application if it were not. The German

(1) [1944] P. 22-24.

(2) [1918] A. C. 435.

(3) [1918] A. C. 422.

company here was not a branch of the Japanese company, but was an entirely separate entity, and the goods could not be deemed, contrary to the fact, to be enemy property. Assuming, however, that it is decided that the German company is an enemy house of trade of the Japanese company, these goods could not at any material time be regarded as the assets of that German house. They could not belong to both houses—that is made clear in *The Anglo-Mexican* (1) and *The Lutzow* (2)—and the question is whether, in the words used in *The Lutzow*, the goods were more the concern of the German house than of the Japanese house. In *The Anglo-Mexican* (1) it is said: " In such a case nice questions may " arise as to whether the captured goods ought properly to " be regarded as appertaining to the enemy house or to one " or other of the branch houses." The difficulty is that the enemy house has for this purpose to be regarded as a notional person; goods cannot belong, or appertain, to it as a house, because there are two houses both owned by the same person. It is the person who owns both the branches who owns the assets. With regard to goods in passage, the enemy house certainly never had possession. It may be that in certain circumstances goods in passage to the enemy house may be regarded as belonging to it, but in other circumstances they would not be so regarded, but as belonging to the branch which shipped them. The problem is what kind of test or criterion in regard to goods in transit to an enemy house is one to envisage in approaching this matter. It was said in *The Lutzow* (2) " Does that make the goods on *The Lutzow* " goods which the appellants must be considered to own as " Germans and not as neutrals? " Applying the circumstances of the present case to that question, it is submitted that in any case where it can be said that control of the goods is reserved by the house of shipment, so that the goods can never reach the German house until fulfilment of certain conditions, the answer is that the parent company must be considered as owner of the goods and not the German house. The question in each case is one of fact, depending on the circumstances of each case—the circumstances under which the goods were shipped and the intention of the shipper. Here the sale and shipment of the goods to Germany did not in the circumstances make the transaction the concern of a neutral

(1) [1918] A. C. 422. (2) [1918] A. C. 435.

company's enemy house of trade or make them liable to seizure as though enemy property.

Gething followed.

Mar. 7. The judgment of their Lordships was delivered by LORD PORTER, who stated the facts and continued: On this state of facts the Crown maintained that the goods were subject to condemnation for three reasons, any one of which would entitle them to succeed. In the first place, it was said that the property had passed to the German company and therefore the goods were enemy property. In the second, that Mitsui, though themselves at all material times a neutral company, maintained a business house in Germany, that the goods "appertained to" that house, and that therefore they were enemy goods, and lastly, it was said that the goods were admittedly conditional contraband, that they were originally destined for Germany and that though they would be free of taint if the destination were changed within a reasonable time after the outbreak of war, yet in the present case the destination was not changed. The inference, it was submitted, should be drawn that though the M.V. *Glenroy* with the beans on board had been diverted to Liverpool, yet they might have been transhipped and sent on, that the suggestion of Rotterdam as a possible destination might well indicate such an intention, and that, at any rate, the mere fact that they were on a British ship which could not proceed to a German port was not enough to effect a change of destination. The President decided against the Crown on all three arguments.

As to the first, he held the contract to be a typical c.i.f. contract. Prima facie this is so. It is in terms such a contract, and therefore in the normal case the property would not pass until the documents were taken up and paid for. Section 19, sub-s. 2, of the Sale of Goods Act, 1893, enacts that "Where "goods are shipped, and by the bill of lading the goods are "deliverable to the order of the seller or his agent, the seller "is prima facie deemed to reserve the right of disposal," and sub-s. 3 enacts that in the case where the seller draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

The appellant agrees that in the ordinary case the property in the goods does not pass, but he says that this is not an ordinary case. So far as sub-s. 2 is concerned, he says that normally the bank to whose order the goods are deliverable is the seller's, not the buyer's agent, but that in the present case the bank was the buyer's agent. Further, he says that in any case the intention to reserve the right of disposal is only a prima facie one and can be disproved by other circumstances. The facts on which he relied for this disproof were :—(1.) That the sellers had obtained a letter of credit from the bank undertaking, if certain conditions were fulfilled (which, in fact, were fulfilled), that the drafts would be honoured on presentation at its house in London ; (2.) that under the letter of credit two copies of the documents were to be sent to the Hamburg branch of the bank without any conditions being imposed on that bank to withhold delivery in case the draft sent to London was not accepted ; (3.) that the draft must be negotiated through a branch of the same bank ; (4.) that the relationship of the parties was such that security for payment was immaterial : the profit would go in any case to one or the other ; and (5.) that the invoice described the goods as shipped "by order and for account of Mitsui "(Hamburg)."

For the purpose of this argument it must, of course, be assumed that the two companies are separate entities, capable of contracting with one another and so organized that the property may pass from the one to the other. It *had* passed, said the Crown, because the sellers had no interest in retaining it : they had negotiated a bill of exchange and received payment, and not only was acceptance and payment to be made by their subsidiary, but they had received a letter of credit from the bank undertaking that it should be honoured : they were no longer interested in the goods : they had been paid in full.

This argument, in their Lordships' view, neglects the liability of the sellers as drawers of the bill of exchange : the bank might fail, or some such event might come to pass as in fact occurred in the present case : the sellers were still interested, and not only in theory but in fact were very much interested in the final disposal of the goods. Nor do their Lordships think that the provision in the letter of credit that two of the sets of documents were to go to the bank at Hamburg is a circumstance from which an inference as to change of property can be drawn. From a letter sent on August 7, 1939, by the Otaru branch of the bank to its Hamburg branch it is plain that the bills of exchange had been drawn on the London office in pursuance of the letter of credit emanating from the Hamburg branch, and that branch from the start was aware that the drafts would be attached to the documents sent to London. The most obvious inference is that the two sets of documents sent to Hamburg were in duplicate for safety's sake, and they may well have been transmitted to Germany so that the goods might be released at the earliest moment at which it was known that the bill had been honoured in London without waiting for transmission of the bills of lading thence. In any case, the issue of a set of three bills of lading is usual, and no inference can, in their Lordships' opinion, be drawn from the mere fact that for convenience sake two are dispatched to a destination where they may be required.

No doubt, having regard to the relationship of the parties, the Japanese company could control the action of the German house, but it may well have been thought desirable to keep their activities, profits and mutual dealings separate. Finally, it is true that the goods were bought "by order and for account "of" Mitsui, Hamburg, but it is plain that Mitsui were not originally principals in this transaction. Mitsui bought the goods, transmitted them to Hamburg and charged the Hamburg house with the price. Neither in this respect nor in the other matters suggested does the transaction seem to be differentiated from an ordinary c.i.f. contract. In their Lordships' view the property had not passed to the Hamburg company.

In the second place, the beans were said to be enemy property not as belonging to the Japanese company as neutrals but as belonging to a neutral company which maintained a branch in enemy territory and as appertaining to the business of that branch. For this argument, as for the former, it was immaterial whether the goods were contraband or not. In either case they were said to be just as much enemy property as if they had been owned directly by the German company. To establish this contention the appellant relied on the principles enunciated in *The Anglo-Mexican* (1), namely, that a neutral, wherever resident, may, if he owns or is a partner in a house of business trading in or from an enemy

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(1) [1918] A. C. 422.

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country, be properly deemed an enemy in respect of his property or interest in such business. To ascertain whether the goods seized in the present case were or were not liable to be condemned as prize in accordance with this principle three questions have to be answered, namely:—(1.) Does the principle apply where the business is carried on by means of a separate limited company incorporated in the enemy country; (2.) are the goods the subject-matter of the present claim sufficiently closely connected with the enemy business; and (3.) does the law give the neutral a locus pœnitentiæ, so that the goods escape taint, if, before capture, he has diverted them so that they may not be delivered to the enemy house but to some other destination.

As to the first point, their Lordships are of opinion that the German company, though in one sense a separate entity from Mitsui, yet is in substance a branch of the Japanese business. The decision in *Daimler Company, Ld.* v. *Continental Tyre & Rubber Company (Great Britain), Ld.* (1), makes it clear that a company may be an enemy corporation though registered in this country; the question is where the control lies. In a case like the present, where the control lies in Japan, their Lordships think that similar considerations may be applied. The substance, not the form, must be observed, and inasmuch as what matter are the facts lying behind the mere formalities of the case, the German company is just as much the creature of Mitsui as if it were a branch office staffed with servants directly responsible to the Japanese company. As is apparent from the matters already stated, every circumstance except the fact of registration in Germany shows it to be an alter ego of Mitsui, doing Mitsui's business and conforming to Mitsui's wishes. If the mere separation of entities were held to prevent the German company from being a branch of the Japanese company then the difficulty experienced by a neutral in maintaining a business in a country at war with Great Britain would largely disappear. In their Lordships' view, a company so closely connected with its Japanese founder cannot escape from being held to constitute a house of business of the latter merely because it is separately incorporated.

In the second place, it was strenuously contended on behalf of the respondents that, whatever might be the relationship between the two companies, the goods in question did not belong to Mitsui (Hamburg) nor were they sufficiently closely

(1) [1916] 2 . C. 307.

connected with its business to make them enemy property. That goods, the property of neutrals, are condemnable only if they have such a connexion with the enemy house of trade has been recognized from the days of Lord Stowell in England, and for a period of similar length in America. In *The Portland* (1) Lord Stowell speaks of " the property of a " British merchant embarked in that trade " (i.e., trade in the enemy country) and later on says " I know of no case, nor of " any principle, that could support such a position as this, " that a man, having a house of trade in the enemy's country, " as well as in a neutral country, should be considered in his " whole concerns as an enemy's merchant, as well in those " which respected solely his neutral house, as in those which " belonged to his belligerent domicile" (2). So in *The Venus* (3) the majority of those comprising the court use the expressions " so much of his property concerned in the trade of the " enemy, as is connected with his residence " (4), and again " As to property engaged in the commerce of the enemy." (4) It is imperative, therefore, to determine whether in the present case the beans were so closely connected with the German business as to make them enemy property. Throughout the judgments and opinions in the decided cases the expressions used are nowhere very precise. As Sir Arthur Channell says in *The Lutzow* (5): " In the cases which establish the rule " the property liable to be treated as enemy property is " described in words which vary somewhat, and which are " often rather vague." Two sets of phrasing have already been quoted. In *The Anglo-Mexican* (6) are to be found the expressions " an enemy in respect of his property or interest " in such business " ; " Will affect the assets of the business " house or his interest therein with an enemy character." (7) " The original claim put forward . . . . in the present case " appears to have been framed on the contention that the " goods . . . . appertained to the American or to the English " branch . . . . and not to their German branch . . . . The " claim, however, in this form was abandoned in the court " below, it being admitted that the goods in question could " not be regarded otherwise than as appertaining to the " German house." (8) No question, however, of the closeness

(1) (1800) 3 C. Rob. 41, 42.
(2) Ibid. 44.
(3) (1814) 8 Cranch 253.
(4) Ibid. 280.
(5) [1918] A. C. 435, 438.
(6) [1918] A. C. 422.
(7) Ibid. 425.
(8) Ibid. 426.

of connexion required arose in that case, since the business was carried on by four partners, two of whom were Germans residing in Germany, one a British subject, who fled and adhered to Germany on the outbreak of war, and one a naturalized American, who made the claim as to his share in the partnership. Moreover, the head office of the business was in Germany though it had branch offices in England and America.

In the case of *The Lutzow* (1) the connexion required did come in issue, since the goods claimed had been purchased by the Hamburg branch of an American firm for another branch in Japan, the purchase being made from certain manufacturers in Germany specified by the Japanese house. The branches were in no sense separate entities, but the Hamburg branch paid for the goods with the proceeds of a draft on the Japanese branch, negotiated with bankers on the security of the bill of lading; the goods were invoiced at cost price and the profits were divisible between the two branches. The goods were captured, but held not to be so connected with the German business as to render them liable to condemnation as enemy property, although a closer connexion might have resulted in the American neutrals being treated as enemies in respect of those goods. These being the facts, Sir Arthur Channell, in considering what connexion is necessary between the goods seized in prize and the enemy branch, quoted the words from *The Portland* (2) and *The Venus* (3) already set out, and quoted also the words of Lord Stowell in *The Jonge Klassina* (4), " A man may have mercantile " concerns in two countries, and if he acts as a merchant " of both, he must be liable to be considered as a subject of " both, with regard to the transactions originating respectively " in those countries." The other phrases of which he takes cognizance are (i.) " if a person be a partner in a house of " trade in an enemy's country, he is, as to the concerns and " trade of that house, deemed an enemy " (*per* Sir Samuel Evans P., in *The Manningtry* (5), quoting from Pratt's ed. of Story): (ii.) " the property of a house of trade established " in the enemy's country is considered liable to . . . . " condemnation as prize " (Wheaton, Dana's ed., s. 334), and (iii.) from Hall's International Law, following *The Jonge Klassina* (4), that a trader in two countries must be regarded as a belligerent or a neutral according to the country in which the transaction has originated. In himself deciding the question, he uses the expression, " Whether the goods . . . . " were the concerns of the branch business . . . . at " Hamburg " (1) and decides that they were not, on the ground that the Hamburg branch was merely a buying agent and after the purchase not concerned with the goods which were at the time of capture and, indeed, from shipment, the concern of the Japanese branch.

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(1) [1918] A. C. 435.

(2) 3 C. Rob. 41, 44.

(3) 8 Cranch 253, 280.

(4) (1804) 5 C. Rob. 297, 302.

(5) [1916] P. 329, 340.

The expressions used in the various cases are set out at some length not because the point now under discussion has been decided in any of them, but because they establish the principle which must guide the Board. Were, then, the beans seized as prize in the present case so connected with the Hamburg house as to be regarded as its concern ? It was argued on behalf of the respondent that they could not be so regarded ; that the very separation of the interest between two companies resulted in the goods being the concern of that company in which the property was vested, and that so long as the Japanese company kept control of them they were its, and not the Hamburg house's, concern. The goods in question never, it was contended, came within the control of the trade of the German house ; the credits, securities, or assets with which they were to be paid for did appertain to the German business, but until the property passed the beans did not : goods over which the head office kept control never became the concern of the German branch within the meaning of this doctrine.

Their Lordships do not assent to this argument : the goods were bought for and shipped to the Hamburg house—finance was arranged by them and the letter of credit, obtained by them from the branch of the Yokohama Specie Bank in Hamburg, contained a proviso that drafts must be negotiated through a branch of that bank. Acceptance, it is true, was to be made in London, but again at the office of the same bank, and the bill of exchange was to bear the inscription, " Drawn " under L/C No. 7766, Hamburg, 5th August, 1939." The bill of lading was endorsed " Notify to Deutsche Mitsui Bussan " A.G., Hamburg," i.e., the German house. The invoice stated that the goods were shipped " by order and for " account of " the German company, and the policy was endorsed in blank. Having regard to these arrangements and

(1) [1918] A. C. 439.

provisions their Lordships hold that these goods on the outbreak of war were the concern of the Hamburg branch rather than of the company in Japan, and therefore were enemy property within the principle referred to in *The Anglo-Mexican* (1).

There remains the question whether the taint of enemy ownership was removed by the act of the Hamburg branch, accepted by the Japanese company, in cancelling the contract and changing the destination of the beans to London or Rotterdam. There is, no doubt, a mode of repentance by which the taint of enemy ownership may be removed from goods shipped by a neutral firm to an enemy branch. The neutral, by English law at any rate, can do so by discontinuing or dissociating himself from the enemy branch either before capture or, if that occurs before he has had a reasonable opportunity of doing so, by taking steps to do so within a reasonable time: see *The Anglo-Mexican* (2). There is no suggestion that any such steps have been taken in the present instance; on the contrary, it appears from the affidavit of Mr. Lawton, sworn on April 28, 1943, that Mitsui had continued to carry on business in Germany until shortly before that date, and there is no evidence that they ever desisted. Except by taking this course there is no suggestion in the cases of any other method of rescuing the goods from condemnation. It was suggested that in a case like the present it would be reasonable, and in accordance with the practice adopted in the case of contraband, that the neutral owner should have an opportunity of removing the enemy taint by changing the destination of the goods at any rate before seizure, and that in any case seizure and not the outbreak of war was the vital date. It was, it was said, a harsh doctrine which would condemn the goods though they had been shipped with complete propriety and though the neutral had taken all necessary steps to withdraw them from reaching the enemy.

Their Lordships do not feel themselves able to accept this argument. In a sense it is a hardship, but the neutral is given a locus pœnitentiæ if he withdraws from the business carried on in the enemy country, and he may well be called on to elect not to continue to assist the trade of the enemy as the price of rescuing his goods from condemnation. In principle, in their Lordships' view, a withdrawal from enemy destination comes too late if made after the outbreak of war. It is true that Sir Arthur Channell in *The Lutzow* (1) says: " It is only " as enemy property at the date of the capture that they can " be condemned, if at all," but this observation must be read bearing in mind that the goods were at the outbreak of war enemy goods, and having regard to the principle that a change of ownership after war has broken out is not recognized by prize law in the case of goods at sea, see *The Vesta,* etc. (2), where Lord Sumner quotes the principle as set out by Sir William Scott in the *Vrow Margaretha* (3): " In a state of " war, existing or imminent, it is held that the property shall " be deemed to continue as it was at the time of shipment till " the actual delivery; this arises out of the state of war, which " gives a belligerent a right to stop the goods of his enemy."

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(1) [1918] A. C. 422.

(2) Ibid. 425.

Where condemnation of the goods is claimed on the ground that they are contraband a different rule prevails, but in the argument under consideration no question of contraband arises, the claim is that the goods are enemy goods. In their Lordships' opinion, for the reasons already given, they are indeed enemy goods, and the principle applicable to enemy goods must be followed without regard to the fact that their enemy character is acquired only because the goods are the concern of an enemy branch of a neutral trader.

A further point was taken on behalf of the Crown, but not pressed as decisive of the case. It was not disputed before their Lordships that the cargo was conditional contraband, and as such liable to condemnation whilst on a voyage to an enemy port, but it was said that that liability ceased when the ship's voyage was diverted and she was ordered to Liverpool. The President accepted this view and held that diversion in fact was sufficient to free the goods whatever the intention or wish of their owners might be. The Attorney-General contended that this ground of decision is too widely stated. In his submission, at any rate to-day, when the doctrine of continuous voyages is freely recognized, it is not enough that the goods are diverted, unless and until they are disposed of in a non-enemy country, or so treated that they cannot reach the enemy country. In the present case he points out that the diversion was not made at the request or with any assent of the owners, nor did they show any unequivocal intention to dispose of the goods in England. The telegrams speak of shipment to London or Rotterdam, and Rotterdam, it is suggested, is

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(1) [1918] A. C. 435, 440.
(2) [1921] 1 A. C. 774, 777.
(3) (1799) 1 C. Rob. 336, 338.

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a convenient port from which goods could be forwarded to Germany. As the point has not been fully argued their Lordships do not think it desirable that they should express any concluded opinion in the matter. The point is open for argument in any future case where the facts admit it. Their Lordships neither affirm nor disaffirm the grounds of this part of the decision below. As to the decision itself, however, they think that the conclusion might have been drawn that the owners in fact intended to end the voyage at a non-enemy port and withdraw the goods from any enemy destination. Such a finding would be conclusive as to any claim based on contraband.

On the ground, however, that the goods were enemy goods at the outbreak of war as being the concern of Mitsui (Hamburg), and that Mitsui took no steps to dissociate themselves from the activities of that branch, their Lordships hold that the goods were liable to condemnation. They will therefore humbly advise His Majesty that the appeal must be allowed and the decree of the Prize Court set aside, with costs, and in lieu thereof that it ought to be pronounced that the goods in question belonged at the time of seizure thereof to enemies of His Majesty and, as such, ought to be condemned as good and lawful prize and as droits and perquisites of Admiralty. The respondent will pay the costs of this appeal.

Solicitor for appellant : *The Treasury Solicitor.*
Solicitors for respondent : *Waltons & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*
1944
Oct. 26, 27, 30, 31 ; *Nov.* 1 ; *Dec.* 8.

LONDON & NORTH EASTERN RAILWAY COMPANY . . . . APPELLANTS.

AND

B. A. COLLIERIES, LIMITED . . . RESPONDENTS.

Mine—Coal mine—Area of Protection—Notice of intention to work minerals—Counter-notice to leave minerals unworked—Compensation payable by railway company—Assessment—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict., c.* 20), *s.* 78, *sub-s.* 4 ; *s.* 78A, *sub-s.* 1 ; *s.* 79A, *sub-s.* 1 (*as replaced by Mines* (*Working Facilities and Support*) *Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 20), *s.* 15).

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* *Present :* Viscount Maugham, Lord Thankerton, Lord Macmillan, Lord Wright and Lord Simonds.

H. L. (E.)

1944

LONDON AND NORTH EASTERN RAILWAY CO.
v.
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In assessing the compensation payable by a railway company to a mineowner under s. 78A, sub-s. 1, of the Railway Clauses Consolidation Act, 1845, as replaced by s. 15 of the Mines (Working Facilities and Support) Act, 1923, for the loss caused by minerals being left unworked pursuant to a counter-notice served by the railway company on the mineowner under s. 78, sub-s. 2, of the Act of 1845, as replaced by the Act of 1923, account must be taken of the possible contribution for which the mineowner might in the future have become liable under s. 79A, if the coal covered by the counter-notice had been actually worked and damage to the railway and works of the railway company had been caused by that working. (Per Lord Thankerton, Lord Macmillan and Lord Wright; Viscount Maugham and Lord Simonds dissenting.)

Decision of the Court of Appeal (sub nom. *B. A. Collieries, Ld.* v. *London & North Eastern Ry. Co.*) [1944] Ch. 243, reversed.

APPEAL from the Court of Appeal.

The facts stated by VISCOUNT MAUGHAM and LORD THANKERTON were as follows: The plaintiffs (the respondents on this appeal) were mineowners in respect of a colliery called the Gedling Colliery, and they worked a seam called the Low Hazel Seam, included within their lease or ownership. A portion of the railway line of the defendants (the appellants on this appeal) ran in a tunnel, known as the Mapperley Tunnel, above this seam, the coal being excepted from their title. Towards the end of 1939 the respondents were approaching the tunnel by their workings. On January 24, 1940, they gave to the appellants a notice in the following terms: " We hereby give notice, under and by virtue of the " Mines (Working Facilities and Support) Act, 1923, Part II., " s. 78, sub-s. 1, that we intend at the expiration of thirty " days from the service of this notice, to work the coal, of " which we are the lessees in part and owners in part, in the " seam known as the Low Hazel Seam at Gedling Colliery, " lying in the area of protection comprising your railway and " works shown on the plan hereto annexed, situate in the " Parishes of Arnold and Carlton in the County of Nottingham." The railway and works were shown on the plan in brown colour. The appellants thereupon served a counter-notice on December 30, 1940, in respect of part of the railway and works which were comprised in the notice, specifying the minerals required to be left unworked for the protection of the tunnel by reference to a plan, on which the area of coal required to be left unworked was shown edged in green colour. On an originating summons, the respondents applied for the determination by the court of two questions, the first of which (the only one in issue) was formulated as follows: " Whether "upon the true construction of s. 15 of the Mines (Working " Facilities and Support) Act, 1923, and in particular ss. 78 " and 78A included in s. 15 aforesaid in assessing the com- " pensation payable by the defendants to the plaintiffs under " the counter-notice dated December 30, 1940, given by the " defendants to the plaintiffs, any account ought to be taken " of the possible contribution for which the plaintiffs might " in the future have become liable under s. 79A if the coal " covered by such counter-notice had been actually worked " and damage to the railway and works of the defendants " had been caused by such working." The parties agreed, for the purposes of this case, that the aggregate amount of compensation so payable would be 37,155*l.* 1*s.* 0*d.*, if no account were to be taken of a possible contribution under s. 79A, but that the said sum must be reduced by the sum of 2,324*l.*, to 34,831*l.* 1*s.* 0*d.*, if such potential liability ought to be taken into account.

Morton J. decided in favour of the railway company. The Court of Appeal (Lord Greene M.R., MacKinnon and Luxmoore L.JJ.), allowed an appeal from his decision. The railway company, with leave given by that court, appealed to the House of Lords.

Sir Walter Monckton K.C., *Bowen K.C.* and *J. B. Herbert* for the appellants. The compensation payable by a railway company to a mineowner for leaving minerals unworked is laid down by s. 78A, sub-s. 1 (ii.) of the Railways Clauses Consolidation Act, 1845, as replaced by s. 15 of the Mines (Working Facilities and Support) Act, 1923. It is to be " a sum " for each ton of the specified minerals, the rate per ton in " the case of minerals lying under the outer area of protection " being one-third of the rate which is or would be awarded in " the case of minerals lying under the inner area of protection : " (see s. 78, sub-s. 5, as replaced). A valuation is to be made of the whole of the specified minerals expressed in a sum per ton, the " value " being what the mineowner would have got for them less the cost of working them. In respect of the outer area, however, the figure put down must be one-third of that applicable to the inner area. For instance, one might arrive at the figure of 6*s.* per ton for each ton of the specified minerals. The next stage would be to multiply 6*s.* by the

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number of tons in the inner area and one-third of that, i.e., 2*s.*, by the number of tons in the outer area. In assessing the compensation the object is to find "the loss caused by the "specified minerals being left unworked" under s. 78, sub-s. 4, of the Act of 1845 (as replaced). These words are wider than "compensation for such mines or any part thereof" in the original s. 78. The leading authorities under the old Act are *London & North Western Ry. Co.* v. *Howley Park Coal and Cannel Co.* (1); *Howley Park Coal and Cannel Co.* v. *London & North Western Ry. Co.* (2); *Smith* v. *Great Western Ry. Co.* (3); *Bwllfa & Merthyr Dare Steam Collieries (1891), Ld.* v. *Pontypridd Waterworks Co.* (4); and *Eden* v. *North Eastern Ry. Co.* (5). An element in the calculation of the mineowner's loss under s. 78, sub-s. 4, is the "value" of the "specified minerals" (see s. 78A, sub-s. 1, as replaced). "Value" is the correlative of loss. What is to be looked at is the net profit the mineowner would have made out of working those minerals had he been allowed to do so., i.e., what he would have got less all proper items of outlay. So the "value" is what he would have got less working costs and expenses. The compensation payable in such a case as this should not give a mineowner more than he would have got had he been permitted to work out the minerals without a counter-notice being served on him. His loss can only be the equivalent of what he would then have made. It would require clear words in an Act of Parliament to give him more, and one cannot attribute that meaning to the words used by the legislature. It would be strange to attribute to it the intention to give the person on whom a counter-notice has been served an advantage which in other circumstances could not have accrued to him. If the respondents had worked the minerals now in question a contribution would have fallen to be made by them under s. 79A, towards the expense of "making good any "damage caused by such working to the railway or works." This must be deducted from the compensation payable by the railway company in respect of the sterilization of the minerals. By s. 85B, sub-s. 2, it is expressly provided that nothing in the Act shall affect the position that a mineowner's right to

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(1) [1911] 2 Ch. 97, 126.

(2) [1913] A. C. 11, 20, 21, 24, 25.

(3) (1877) 3 App. Cas. 165, 184, 185, 187.

(4) [1903] A. C. 426, 428.

(5) [1907] A. C. 400, 402, 403, 406.

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let down the surface is subject to payment of compensation for surface damage when the mineowner's title to work is antecedent to the railway company's acquisition of the surface. The value of the minerals in such a case in any event must have regard to the liability for surface damage. It does not matter whether the contribution is called a deduction from the value of the minerals or an increase in the outlay of working them. The loss under s. 78A cannot be found unless account is taken of this matter. If it were excluded the mineowner would be recovering in respect of loss more than ex hypothesi he had lost, since ex hypothesi the counter-notice has sterilized the minerals, the working of which would have caused damage to the railway, and one must for this purpose assume that all the specified minerals would have been worked. It cannot be taken that the mineowner is to have compensation for all these minerals on the assumption that he would not have worked them all and that therefore no contribution would have been payable by him for he is, by s. 79, entitled, in the absence of a counter-notice, to work all the minerals in a proper and usual manner. In dealing with the question of this contribution one cannot change the assumption, on which the figure of the compensation payable by the railway company is based, that all the minerals would be worked, and make a fresh assumption that some of the minerals for which credit has already been given would not have been worked. In this connexion improper working is excluded from consideration, since s. 79 of the Act as amended provides a remedy for that. The fact that ex hypothesi no damage has in fact been done to the railway does not mean that one must leave out of account the damage that would have been done if the minerals had been worked. The problematical potentiality of the working letting down the railway works must be entertained, for s. 79A contemplates the possibility of damage. There are cases where it would be perfectly plain that working must do grave damage to a railway (e.g., if there were to be deep workings beneath St. Pancras Station), and in such cases the contribution is payable. It matters not that there may be other cases where the possibility of damage is so uncertain that no contribution should be payable. The arbitrator, looking at all the facts, must determine whether the contribution is payable. In the present case it is clear that the working of the specified minerals would cause damage to the railway. The parties have in fact agreed upon the quantum of

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such damage. By s. 79B safeguards are provided as an assistance to the mineowner in cases under s. 79A, but sub-s. 1 of s. 79B provides that they shall come into force " when and so far " as reasonable and practicable." In the present case it cannot be " reasonable and practicable " for the railway company to do any of the things set out in the sub-section. All the parties here are in the position of estimating the future. It is not the position that the liability of the mineowner under s. 78A to contribute must be left out of account because something which in other circumstances would have been within the peculiar knowledge of the railway company (and accordingly under the Act must be put at the disposal of the mineowner) is not in the possession of either party. The machinery in s. 79B is part of the machinery of the Act in ordinary events and is really providing that in the ordinary case the railway company's knowledge is to be imparted in due time. In the present case those very matters are not such that notice of them can be given; they are matters which the arbitrator must decide for himself: see *Darley Main Colliery Co.* v. *Mitchell* (1). It is implicit in the language of s. 79B that there will be occasions when it will not be " reasonable and " practicable " to work this machinery at all. The opening phrase of sub-s. 1 postulates this. It is not laid down that in such cases s. 79A cannot be invoked. It is not an essential feature in the operation of s. 79A that s. 79B should be operable. It would be hard if in a case where plainly the s. 79B machinery could not be used, s. 79A must be left out of account altogether, even though it meant that in the result the mineowner would get something more than he would have got if he had been left to work the minerals.

Bowen K.C. following. Four points are to be considered: (1.) What is to be valued? (2.) Is any distinction to be drawn between the mineowner and the royalty owner. (3.) The difficulty of assessment. (4.) What is the consequence of the decision of the Court of Appeal? On the first point, we are concerned with minerals in situ which have value as (*a*) support and (*b*) raw material, the former the value to the railway company, the latter the value to the colliery company. The value to the latter must be considered. In considering that value in the future many complex variables must be calculated, e.g., the cost of repairs underground, underground transport, welfare charges, cleaning and screening on the surface, in-

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(1) (1886) 11 App. Cas. 127, 132.

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surance in respect of workmen's compensation. There is no distinction between the cost of repairs underground and the cost of repairs to surface structures damaged by working the minerals. It matters not whether the factor arises by contract or by statute. Whatever item enters into the profit and loss account affects the value of the raw material. A distinction was sought to be made between a physical obstacle and a legal one, but a legal fetter imposed by statute also depreciates the value of the raw material: see *Edinburgh and District Water Trustees* v. *Clippens Oil Co., Ld.* (1). What is to be solved is the loss to the colliery company of the right to work the minerals in question, and that pre-supposes actual working which makes operative s. 79A. As to the second point, s. 78A, sub-s. 1 (iii.), contemplates that in assessing the compensation to be paid to the royalty owner future working must be taken into account, assuming that all the coal would be worked out and that there would be the probability of damage. The damage must be quantified to arrive at the deduction to be made from the royalty. If there is no contribution from the mineowner there is no deduction. The section, on the face of it, is not sufficient to absolve the royalty owner from the possible results of the working of the coal and the operation of the code laid down in the Acts. The provisions of s. 79B exist only for the purpose of enabling the colliery company to check the accounts of the railway company. They would not come into operation in the case of a royalty owner. On the third point difficulty of assessment is no sufficient reason for excluding a duty of assessment: *W. N. Hillas, Ld.* v. *Arcos, Ld.* (2); *Livingstone* v. *Rawyards Coal Co.* (3). In actual practice the calculation of future profits and costs has always been made under the Act of 1845, and there is a fund of experience available by way of evidence as to what is likely to be the quantum of damage caused by any particular working. The arbitrator must do the best he can in the light of the evidence before him. If the evidence is unsatisfactory he can award merely nominal damages, but he must take the liability into account. On the fourth point, the two consequences of the Court of Appeal's decision are (*a*) that any evidence as to the possibility of damage if the coal were worked is completely excluded from consideration, and (*b*) that, so far at any rate as the inner area is concerned,

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(1) (1902) 4 F. (H. L.) 40, 48, 49; 87 L. T. 275, 277, 278.

(2) (1932) 147 L. T. 503.

(3) (1880) 5 App. Cas. 25.

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under s. 85B, sub-s. 2, the mineowner with a prior right to let down the surface unconditionally would get no more compensation for leaving the minerals unworked than the mineowner whose prior right was to let down the surface subject to payment of compensation.

Macaskie K.C. and *Jopling* for the respondents. The result of the Act of 1845 was to put on the mineowner wishing to work minerals beneath the surface lands which he had transferred to a railway company the obligation to give notice of his intention to do so. That notice had to relate to a prescribed area which in most cases was forty yards (see s. 78). If the railway company served a counter-notice sterilizing the minerals the compensation payable under s. 6 included (*a*) compensation for "value" and (*b*) compensation for all damage sustained by the owners and other persons interested in the minerals, which would include severance and injurious affection. The Act did not specifically provide that the railway company was deprived of its common law right of support, but it was held in *Great Western Ry. Co.* v. *Bennett* (1) that the result was to deprive the company of all right of support within the forty yards area unless the whole or a part of the minerals were sterilized by a counter-notice. The result was that if the railway company were satisfied that only a portion of the support was required by the railway works within the forty yards area, and gave a counter-notice affecting only part of the minerals, the mineowner could work the rest as if there were no railway there and, provided he did so properly in accordance with ordinary mining practice, the railway company had no remedy if damage were done to the railway works above. The mineowner's right to "full compensation" involved the railway company in paying for the minerals covered by the counter-notice their full value, arrived at by deducting the cost of getting, for the arbitrator must find the value of the cost on the basis of what the mineowners would have made out of it during the time it would have taken to get it. Although s. 79 provided for that, and the mineowner was liable for "improper working" of minerals not covered by a counter-notice, it was never suggested that the possibility of improper working should be taken into consideration in relation to that notional working, although that would be just as easy to calculate as the possibility of damage resulting from proper working, and if in ordinary mining practice it were

(1) (1867) L. R. 2 H. L. 27.

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found that on an average a certain proportion of minerals were badly worked it might have been argued that that should be taken into consideration. Under the Act of 1845 there was no question of any liability for contribution such as that created by s. 79A of the Act, as amended by the Act of 1923. The Act of 1845 was passed in an era of shallow working. Only between 1845 and 1923 did the era of deep working begin. Then in *Howley Park Coal and Cannel Co.* v. *London & North Western Ry. Co.* (1) it was held that the Act of 1845 had not deprived railway companies of their common law right of support beyond the forty yards area. Then arose the question of reconciling (*a*) the needs of the railway companies to sterilize a wider area because of the consequences of deep mining, and (*b*) the needs of the mineowners to free themselves from the liability to afford support beyond the forty yards area. The result was the 1923 Act, which increased the area of protection and in addition gave the railway companies, if they did not cover the minerals to be worked by a counter-notice, the right to a contribution from the mineowners if and when they were worked and injury was done to the railway works. It is permissible to consider, with reference to the words used, the circumstances existing at the time the Act was passed: see *River Wear Commissioners* v. *Adamson* (2). There is no distinction between the words " compensation for " such mines " in the original s. 78 and compensation " for " the loss caused by the specified minerals being left un- " worked " in s. 78, sub-s. 4, as replaced: see s. 78A, sub-ss. 1 (ii.), and 2, and s. 81. So far as compensation is payable in respect of the value of the sterilized minerals there is under the Act a purely arbitrary basis for the compensation both to the mineowner and the royalty owner. A rate is to be ascertained for the specified minerals, some lying beneath the inner and some beneath the outer area of protection. The rate for the outer area depends entirely on that ascertained for the inner area. The " sum for each ton " (s. 78A, sub-s. 1 (ii.)) of the minerals in the outer area is to be arrived at, not by taking the rate per ton of those minerals, but by attributing to them one-third of the rate awarded to the inner area minerals. The value of the minerals in the outer area is irrelevant. If the specified minerals in the inner area amount to fifty thousand tons, one must ascertain their market value, deduct the cost of getting them, divide that sum by fifty thousand and

(1) [1913] A. C. 11.

(2) (1877) 2 App. Cas. 743, 763.

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so get a rate per ton. The value of the coal in the inner area, less all proper deductions, whatever they may be, is the yard stick by which one arrives at the rate. It is possible that the minerals in the outer area may be less valuable or more valuable than those in the inner area, but in practice the seam is the same and so is the quality, unless there is a fault or something of that kind. If the respondents' construction of s. 78A, sub-s. 1 (ii.) is correct, it is immaterial to consider the individual value of the minerals in the outer area and, further, if a notional contribution under s. 79A were held to be an element of working cost, it would be equally immaterial to consider what that contribution in respect of the outer area would amount to; there would only be the contribution in respect of the inner area. In asking oneself whether s. 79A was ever meant to apply to s. 78A, sub-s. 1 (ii.) one must consider that under that proviso one would only have to discover the estimated quantum of contribution for the inner area minerals and one would arrive at a figure as the basis of the rate payable for the outer area minerals, which bore no relation to s. 79A, because one would have to ignore the contribution in respect of the outer area minerals. On the other hand, if the appellants' suggested method of calculating the "sum for each "ton" were right, by lumping the minerals in both areas together one would not be giving full value to s. 79A, because the liability to contribute, which would depend on the estimated damage, might be much heavier in respect of the inner area than the outer, e.g., in the supposed case of workings under St. Pancras Station. In assessing compensation under s. 78A no account is to be taken, as an item of working cost, of the notional working of the specified minerals, of any liability to contribute under s. 79A. As under the Act of 1845, full compensation is based on the market value of the minerals less the cost of getting. Having regard to s. 85E the position of the mineowner as regards the assessment of his compensation is precisely the same under the 1923 Act as under the 1845 Act, for he is there stated not to be under any liability to leave support. The opening words of s. 85E do not imply that a liability to contribute is to be taken into account in assessing compensation. Under s. 79A, sub-s. 1, the liability to contribute does not arise (*a*) until an actual demand is made; (*b*) unless actual damage has been caused by the working; (*c*) until expenses have been properly incurred in making good damage, and (*d*) except in respect of damage to works not being

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protected works comprised in any counter-notice relating to the area of protection. If the arbitrator had to take into account the liability to contribute in respect of hypothetical future damage he would encounter the difficulty of not knowing what railway works might then have been placed on the surface. Under s. 79B, on which s. 79A depends, one is not in the realm of hypothesis in dealing with actual damage, and there is little difficulty in estimating the damage already caused and the damage to be apprehended. In actual practice there is no insuperable difficulty in providing the particulars under the three heads of s. 79B, sub-s. 1. These are meant to give the mineowner the chance of seeing for himself whether the claim is made out. That is also the reason for the separate accounts prescribed by sub-s. 2. These safeguards for the mineowner deal with actuality and the appellants' contention would deprive him of them in such a case as this. The royalty owner is also concerned with s. 79B: see s. 79A, sub-s. 6. The words "or to be incurred" in s. 79A, sub-s. 1, relate only to such a case as where a railway company is engaged in underpinning a tunnel or part of the track which has shown signs of collapse, but it is not known how far the damage will go, so that at the moment it is uncertain what expenses will have to be incurred in the future. The words cover an attempt at repair which has not proved successful so that further expenses must be incurred. In the sub-section the stress is on the words "any "damage caused," which do not cover damage apprehended to be caused. The futurity applies to the assessment not of damage but of expense: see *Darley Main Colliery Co.* v. *Mitchell* (1) and *West Leigh Colliery Co., Ld.* v. *Tunnicliffe & Hampson, Ld.* (2). These cases must have been present to the mind of the legislature in passing the Act of 1923. As the liability to contribute under s. 79A is confined to damage to unprotected works outside the counter-notice, it could not have been intended by the legislature under s. 78A (which provides for compensation for those minerals sterilized by the counter-notice to protect wholly different works) that the railway company should get an additional benefit by reason of s. 79A. There is a vital conflict between ss. 78 and 78A on the one hand and ss. 79A and 79B on the other. They are entirely unrelated, the latter only applying to actual workings, and any attempt to apply them to hypothetical workings leads to incalculable difficulties. By s. 78A, sub-s. 1 (iii.) the royalty owner's

(1) 11 App. Cas. 127.

(2) [1908] A. C. 27, 29, 31.

compensation is fixed and there is no indication that it is to be diminished by a possible liability to contribute under s. 79A, so that he has no interest in working costs. It cannot have been contemplated that deductions in respect of contributions under s. 79A should be made in the case of mineowners but not in the case of royalty owners. Under s. 79A, sub-s. 2, and sch. II. to the Act of 1923, whereby is fixed the area for the purpose of computing the mineowner's maximum liability in respect of the contribution under sub-s. 1, the tonnage is not the same as that of the "specified minerals" under s. 78A, in respect of which compensation is paid by the railway company. Difficulties would arise if the former were larger than the latter, particularly under s. 79A, sub-s. 3, under which the mineowner making a contribution is entitled to deduct from any royalties one-third of the amount contributed. There are no difficulties under sch. II. where one is dealing with actualities. If under s. 78A the arbitrator had to treat this contribution as an element in working cost he would have to decide (1.) when the working would take place and where the whole area will be swept clean ; (2.) when and where subsidence will occur ; (3.) what damage might be done ; (4.) the cost of making it good. In addition, he would have to make calculations under sub-ss. 2 and 4 of s. 79A. If a lump sum as compensation were awarded to the mineowner, ascertained after deducting a sum in respect of his contribution under s. 79A, it would not in future be possible to give effect to the limitation on his liability in sub-s. 4 of that section, because the award could not be disintegrated. If, therefore, the arbitrator debited the maximum against the mineowner, then, when the unspecified minerals came to be worked and damage was done, the mineowner could not have the benefit of that maximum. Further, having found the point of time when the damage would have occurred, the arbitrator, to ascertain whether the amount of that damage came within the maximum, should know the damage outside the specified area, but to ascertain it would inordinately extend the scope of the inquiry. The impossibility of the arbitrator making a satisfactory notional forecast is conclusive that the legislature cannot have intended the notional liability for contribution to be introduced as an element of working cost. Mere difficulty of assessment is not enough, (see *Chaplin* v. *Hicks* (1)), but such a catena of difficulties as is here inevitably amounts to real impossibility

(1) [1911] 2 K. B. 786.

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and, short of express words in the Act or necessary implication, evincing the intention of the legislature that they must nevertheless be attempted, the House will not impose a radical departure from the old basis of compensation. In reducing the compensation for the outer area minerals to 33⅓ per cent., the legislature intended to allow for everything it could think of. If the appellants' contention had been intended in the Act it would have been easy to express it. *Edinburgh and District Water Trustees* v. *Clippens Oil Co., Ld.* (1), relied on by the appellants, is not a parallel case. As regards their contentions under s. 85B, sub-s. 2, the position of a person enjoying an antecedent right thereunder has no bearing on the case of the minerals in the present instance. A colliery company with an antecedent right is on the same footing as an ordinary mineowner only with respect to the inner area. The mineowner without an antecedent right only gets one-third compensation for outer area minerals, while an antecedent right comports 100 per cent. compensation for all minerals, whether in the inner or the outer area.

Jopling following: If a mineowner and a surface owner entered into an agreement on the terms that the surface owner should give up all his rights to support, on condition that (*a*) he was to be entitled to prohibit working of any minerals on payment of their full value and of the extra cost of working other minerals caused by the prohibition, and (*b*) where damage was caused by other minerals being worked, the mineowner was to pay a fixed contribution to the cost of repairing the damage, one could not predicate that it was the intention of the parties that the element of compensation for damage in the worked area was to be an element in calculating the value of the minerals in the unworked area. The reason is that all right of support is given up (see s. 85E). The full value is what the mineowner can get for the coal, and to discover that there must be a notional working. *Eden* v. *North Eastern Ry. Co.* (2); *Smith* v. *Great Western Ry. Co.* (3); *Bwllfa & Merthyr Dare Steam Collieries (1891), Ld.* v. *Pontypridd Waterworks Co.* (4); *Edinburgh and District Water Trustees* v. *Clippens Oil Co., Ld.* (1), and *Wigan Corporation* v. *Wigan*

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(1) 4 F. (H. L.) 40; 87 L. T. 275.

(2) [1903] A. C. 400.

(3) (1877) 3 App. Cas. 165.

(4) [1903] A. C. 426.

Canal (1) do not assist in the present problem. The proper interpretation of s. 78, sub-s. 4, of the Act as amended, requires it to be read: " The company shall pay such com-" pensation as is hereinafter set out to the mineowner and " the royalty owner for the loss caused by the specified " minerals being left unworked." That does not mean full compensation, since only one-third of the value of a large part of the minerals is given. It is in fact an artificial compensation. Further, in areas in respect of which a counter-notice would be served, there would probably be heavy railway works, to protect which the railway company would wish to sterilize minerals. The kind of area to which the provisions of s. 79A would be applied would be long lengths of line and places without any very heavy works, such as tunnels, viaducts or stations. If the appellants were right s. 79A would be applied to matters of a different character. From s. 78, sub-s. 4, one would expect the mineowner and the royalty owner to be treated in the same way. Under s. 78A, sub-s. 1 (iii.), there is nothing to bring in the element of contribution in respect of notional damage. The words " reserved by and payable under the " lease comprising the minerals " in s. 78A, sub-s. 1 (iii.) (*a*), cannot mean notionally reserved. Further, if the railway company do not specify a large enough area for the protection of their works, then, however much damage is caused to the protected works by the working of the minerals, no contribution to that damage is payable by the mineowner. Yet, if the respondents were right, a mineowner might be liable in respect of an immense amount of damage to protected works calculated to result from a notional working. Moreover the calculations under s. 79A, sub-s. 2, present no difficulty in the case of actual damage, but they would present great difficulty if the future were to be considered. The care and detail with which the code in this Act is worked out suggests that it was intended only to meet actual facts. The detailed and exact provisions relating to the contribution are not such as one would expect to find if the Act contemplated that they were to be considered in every case of valuing specified minerals, so as to entail a great deal of speculation. Since another construction is possible it should be adopted. The object of the provisions of the Act of 1923 appears to be to preserve as far as possible the position of the mineowner with regard to the inner area and to make the changes dealing

(1) (1902) Unrep. See MacSwinney on Mines (5th ed.), para. 877.

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with the outer area only. Additional burdens were imposed on the mineowner where the outer area was concerned and the further drawback contended for by the appellants should not be brought in.

Sir Walter Monckton K.C. in reply. The mere difficulty of taking into account the contribution under s. 79A is not sufficient to exclude it : *Chaplin* v. *Hicks* (1). The parties in this case agreed a figure representing this factor and arbitrators often have to take all sorts of hypothetical elements into consideration. In finding what the mineowner would have got if he had worked the minerals, this element should not be left out of account : see s. 85B, sub-s. 2. It cannot have been intended that the mineowner was to get the same compensation whether his right to let down the surface was unconditional or subject to compensation. The respondents relied on the wording of s. 79A, sub-s. 1. The phrase " on " demand " is mere machinery and only means that the railway company must ask before they are entitled to get payment. As regards " damage caused," if there had been no sterilization and the mineowner had worked the specified minerals, damage would have been caused and he would have been liable to contribution. Similarly as regards the phrase " not being protected works," if no counter-notice had been served and the minerals had been worked the contribution section would have applied. In this hypothesis there are no specified minerals and no protected works, as, in order to find out what the mineowner would have made had he been free to work the minerals, one assumes that there was no counter-notice to prevent him. In computing the amount of the contribution it is not necessary to take into account possible future railway works. *Darley Main Colliery Co.* v. *Mitchell* (2) and *West Leigh Colliery Co., Ld.* v. *Tunnicliffe & Hampson, Ld.* (3) do not assist because they are only concerned with the common law cause of action. As regards the maximum liability for contribution in s. 79A, sub-s. 4, it was said by the respondents that if the contribution were taken into account in computing the mineowner's compensation there was no machinery whereby the sum representing the figure of the contribution could be ascertained and taken into account in diminution of the maximum, but in the definition of a single mineowner " all the minerals which the mineowner

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(1) [1911] 2 K. B. 786.

(2) 11 App. Cas. 127.

(3) [1908] A. C. 27, 29, 31.

" is entitled to work " and, therefore, to the extent of the minerals sterilized by the counter-notice, the maximum is diminished. The effect is that the mineowner is credited with the full amount in respect of every ton of the specified minerals. As regards the particulars under s. 79B, they are secondary in the sense that they are only important when there is an opportunity of giving them, in order that the mineowner may ascertain precisely the nature of the claim and the damage.

THE HOUSE took time for consideration.

Dec. 8. VISCOUNT MAUGHAM (read by LORD SIMONDS): My Lords, the question raised on this appeal turns on the true interpretation of certain sections, particularly ss. 78 to 85E, of the Mines (Working Facilities and Support) Act, 1923, which were substituted (by s. 15 of that Act) for ss. 78 to 85 of the Railway Clauses Consolidation Act, 1845. The first, second and third schedules to the former Act were also substituted for the first, second and third schedules to the Act of 1845. I cannot say that the substituted sections and schedules are easier to construe than those which they replaced.

The appellants served a counter-notice on December 30, 1940, in respect of part of the railway and works which were comprised in the respondents' notice, specifying the minerals required to be left unworked by reference to a plan. These are called in the Act of 1923 " the specified minerals," and are sometimes described as being " sterilized " by the counter-notice. The mineowner and the royalty owner (if any) are entitled to compensation for the loss caused by the specified minerals being left unworked (s. 78, sub-s. 4), and that compensation is, somewhat loosely, defined in s. 78A.

Your Lordships have been informed that the question formulated by the originating summons is of great importance to many railway companies and colliery owners throughout the country. My Lords, I find myself in agreement with the reasons and considerations contained in the judgment of Lord Greene M.R. and Luxmoore L.J., with which MacKinnon L.J. substantially agreed, and I do not think it necessary to repeat them. I propose, however, to add a few observations which tend, I think, to support their view.

It is not accurate to refer to the common law right of support to which the owner of the surface of land is entitled from the subjacent land as if that right extended to all the buildings and works on the surface. The common law right is to have support to the land in its natural state, which is not an easement, but an incident to the land itself (see per Lord Selborne L.C. in the leading case of *Dalton* v. *Henry Angus & Co.* (1)). The surface owner may of course acquire by grant, prescription or statute an easement of support for his surface burdened with buildings and other works. This consideration is, I think, of importance in relation to the question before us; for it is an error to suppose that the "specified minerals," which under s. 78 of the Act of 1923 have been required to be left unworked, would if worked have exposed the mineral owner to a claim co-extensive with that which may be made (under s. 79A) in relation to the working of minerals lying under the area of protection but not being "protected works." Section 79A, sub-s. 1, of the Act of 1923 refers to "any damage caused by "such working to the railway or works" of the railway company. That is, it is not confined to the infringement of the right to have the land in its natural state. It is conferring a statutory right of a special kind (extending as it does to all buildings and works whenever built), and, having regard to the provisions of the six sub-sections, a right of a very artificial and complex character with several provisions limiting the liability of the mineowner which otherwise might be very great. We must not therefore begin with the assumption that by s. 78, sub-s. 4, "the loss caused by the specified minerals being "left unworked" must be calculated with a deduction for the hypothetical damage which would necessarily be caused to the railway and works by a hypothetical working of the specified minerals. That, I think, would be a deduction for damage on the footing of a special and non-natural right of support, and we must find words in the sections which justify such a deduction. Where there is a right to support of land in its natural state and it has had artificial burdens, e.g., buildings placed upon it, then if the buildings are injured the owner claiming damages has to prove that the land would have been damaged even if it had been left in its natural state (*Brown* v. *Robins* (2); and see MacSwinney on Mines, 5th ed., para. 613). It does not seem to me possible, except by a guess, to establish such a proposition in a case where there have been no workings, no subsidence, and no injury to any buildings or other works.

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(1) (1881) 6 App. Cas. 740, 791.

(2) (1859) 4 H. & N. 186.

Another circumstance to be borne in mind is that damage by infringement of the right of support does not in many cases arise at all as an element in ascertaining the value of the minerals left unworked; for in many cases the minerals could be worked without infringing the right. The sections extend to all kinds of minerals, some of which can certainly be worked without causing subsidence. Even in the case of coal there may be a stratum of marble or other hard stone which will make it unnecessary to leave any minerals for support of the surface. The minerals themselves, such as ironstone, may lie in hard rock: see *Caledonian Ry. Co.* v. *Sprot* (*or Garnkirk*) (1); *North Eastern Ry. Co.* v. *Elliot* (2). Again the proper and usual method of working may include the leaving of sufficient pillars for support or some other artificial support, and it may not pay the colliery owner to remove the pillars or other support. The Act itself in s. 81, sub-s. 1, contemplates that "where a counter-notice has been given," the mineowner may yet suffer additional expenses and losses by reason of "the mine being worked in such manner and under such "restrictions as not to prejudice or injure the protected works." For instance the mineowner may be the lessee of a seam working under restrictions imposed by his lessor which will or may preclude the letting down of the surface. He then gets an "appropriate percentage (if any)" of his additional expenses and losses. It seems to be difficult to reconcile this section with the view that the loss caused by the minerals being sterilized by the counter-notice (mentioned in the first line of the section) must be diminished by an estimate of hypothetical damage caused by a hypothetical working. Thirdly, it should be remembered that in 1923 it was the general view, as shown by many cases, that coal (to say nothing of other minerals) could be so worked as to keep up the surface. It must be noted that where under the Act of 1923 the mineowner is allowed to work he is precluded by s. 79, sub-s. 1, from working minerals (after he has served his notice of intention to work) otherwise than "in the manner proper and necessary for the beneficial "working thereof and according to the usual manner of working "such minerals in the district," and he has under s. 79, sub-s. 2, to make good all damage caused by "improper working." These provisions are inserted for the protection of the railway company and in the hope that the permitted workings will not

(1) (1856) 2 Macq. 449, 451.

(2) (1860) 1 J. & H. 145, 152, 153.

seriously let down the surface, though it was appreciated that such damage was possible. In view of these facts it might reasonably have been anticipated that if it had been intended to provide that in estimating loss (as mentioned in s. 78) caused by specified minerals being left unworked the arbitrator was to make a deduction for a possible damage by a hypothetical working in the usual manner not merely to the surface but also to the railway and works, that would have been stated in clear language.

The problem of assessing compensation to a mineowner who has become bound to leave specified minerals unworked for support of the surface and the works thereon has been arising under private and public Acts for at least a century. It arose under the Railway Clauses Consolidation Act, 1845, s. 78, and under the Waterworks Clauses Consolidation Act, 1847, s. 22, and the Acts which incorporated one or other of these Acts. It is a striking fact that your Lordships have not been referred to a single authority to show that in such a case compensation has been or should be assessed not only for the value of the minerals less the costs of getting them to the surface, but also with a deduction for the hypothetical damages which might be payable for letting down the surface and the buildings and works thereon. Moreover, in some cases it seems to be clear that the compensation to the mineowner has been assessed without making such a deduction: (see *Bwllfa and Merthyr Dare Steam Collieries (1891), Ld.* v. *Pontypridd Waterworks Co.* (1); *Eden* v. *North Eastern Ry. Co.* (2), affirming a judgment of Bigham J., where apparently no such deduction was made.) The legislature must be taken to have known that the right to such a deduction prior to the Act of 1923 was at any rate in doubt, and I can find nothing in the Act to show any intention to decide the matter in favour of the railways.

The question, then, that arises, in my opinion, is whether as a matter of construction the Act has provided by express words or necessary implication that for the purpose of ascertaining " the loss " to the mineowner referred to in s. 78, sub-s. 4, all the artificial and elaborate provisions of s. 79A of the schedules must be applied, though they include damage to the railways and works which may be on the surface when subsidence occurs. I find it very difficult to suppose that that was intended, since s. 79A begins with the words " if a mineowner works any " minerals lying under any part of the area of protection in

(1) [1903] A. C. 426. (2) [1907] A. C. 400.

"the manner authorized by this Act." As I have already pointed out, this refers to an actual working in a necessary and proper manner and in the usual way. Obviously it relates in terms to an actual working. Moreover, the words in the bracket in s. 79A, sub-s. 1, "not being protected works com-"prised in any counter-notice relating to such area of protec-"tion," seem clearly to confirm the view that the section is confined to an actual working and is not applicable to a hypothetical working causing a hypothetical injury in cases where it is not possible to be certain that any subsidence would have been caused if the working had taken place. This view is, moreover, powerfully supported by the reasons and considerations contained in the judgment of the Master of the Rolls and Luxmoore L.J., to which I have already referred. I have also had the advantage of reading in print the speech which my learned friend Lord Simonds is about to deliver, with which I so fully agree that I do not think it necessary to state his reasons in my own language.

I will only add that I do not think it necessary to decide that the extraordinary difficulty of the task which, on the respondent's contention, would assuredly be cast upon the arbitrator would be alone a sufficient answer to this appeal. The legislature might conceivably have imposed on the arbitrator the duty of making a mere guess. My conclusion is based also on the framework of the sections which have to be construed in the light of the authorities, and on the view I have endeavoured to express that if the legislature had intended that the artificial provisions of s. 79A were to be invoked for the purpose of ascertaining the hypothetical loss caused to the mineowner by hypothetical subsidence, it must have said so. The language used, in my opinion, points to the contrary conclusion. My Lords, for these reasons I am for dismissing this appeal, but since a majority of your Lordships, as I understand, take the other view, the appeal must be allowed.

Lord Thankerton. My Lords, this appeal raises an important question as to the basis of assessment of the compensation for minerals—in this case coal—which the appellants have required the respondents to leave unworked under the provisions of the Railways Clauses Consolidation Act, 1845, as amended by s. 15 of the Mines (Working Facilities and Support) Act, 1923. My Lords, so far as it goes, I find it unnecessary to repeat the clear statement by the learned

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Master of the Rolls of the state of the law under the Railway Clauses Consolidation Act, 1845, and the common law, as laid down in *Howley Park Coal and Cannel Co.* v. *London & North Western Ry. Co.* (1). I will only remind your Lordships that in *Great Western Ry. Co.* v. *Bennett* (2), it had been decided by this House that, as regards the minerals within the distance prescribed by the special Act, or, otherwise, within forty yards, the Act of 1845 had created a specific code, by which alone the rights of the company and the mineowner were regulated, and that the company could only secure support by service of a counter-notice. It may further be borne in mind that the working of the deep coal measures which is so common now was a development of the industry subsequent to 1845.

But the statement of the Master of the Rolls fails to notice a decision of this House in 1902, which, in my opinion, is relevant and crucial for decision of the present question in view of the course that the arguments have taken, and the statement by the learned Master of the Rolls that (3) : " The use of the word " 'value' in s. 78A, sub-s. 1, of the new code does not suggest " that any departure from the old basis of compensation is " intended or that a new factor, unknown under the old code, " is to be taken into account. The potential liability to " contribute cannot affect the value of the minerals when " brought to market, nor, as it seems to us, can it be properly " described as part of the cost of working within the meaning " of *Eden* v. *North Eastern Ry. Co.* (4)." The decision in *Edinburgh and District Water Trustees* v. *Clippens Oil Co., Ld.* (5), which was referred to at the hearing of this appeal, is quite inconsistent with that statement. The water trustees owned two water pipes alongside each other which passed through the lands of the Clippens company ; the latter were under a common law obligation to support the Crawley pipe, which was the older one. The water trustees had served a counter-notice under s. 22 of the Waterworks Clauses Act, 1847, on the Clippens company to abstain from working certain specified minerals under the Moorfoot pipe, and the compensation was fixed by arbitration and an award was issued. The Clippens company sued on the award. It was held, affirming the judgment of the First Division of the Court

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(1) [1913] A. C. 11.

(2) L. R. 2 H. L. 27.

(3) [1944] Ch. 243, 253.

(4) [1907] A. C. 400.

(5) 4 F. (H. L.) 40 ; 87 L. T. 275.

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of Session, that the question referred to the arbiters was the amount of compensation payable by the water trustees for the minerals which they had prevented the company from removing by the statutory notice, and that, in fixing the amount it was necessary for the arbiters to consider what minerals the company were precluded from removing by their common law obligation to support the Crawley pipe, and that the judgment of the arbiters was conclusive. Though the Earl of Halsbury L.C. had some doubt whether the arbiters had adequately considered the matter, all the five noble and learned Lords who took part agreed as to the duty of the arbiters. The Lord Chancellor said (1), " if incidentally, by " reason of its existence and its legal foundation, the one " pipe could not be supported without, at all events to some " extent, giving support to the other, then, not by reason of " any legal principle, but by reason of physical necessity, if " the one was supported and had a right to support, and the " other could not be disturbed physically without disturbing " the neighbouring pipe by reason of the combining together " of these two—the right of the one and the physical " proximity of the other—I should have thought it was " improper to allow the mineowner to have an unqualified " right to remove all the minerals simply because in respect " of one of the pipes the notice under the Act was sufficient " to call into operation the functions of an arbitrator." Lord Macnaghten, after referring to the service by the appellants of the counter-notice under the Act, said (2): " On the other " hand, what was the position of the respondents? The " minerals belonged to them. They could not, indeed, work " so as to injure the Crawley pipe, but, if they could avoid " doing injury to it they were free to work out every particle " of the minerals lying under the pipe-track. There was " a restriction on their working, but the minerals were theirs. " There was no adverse claim; there was no question of title. " It was for the arbitrators or the oversman to determine " what amount of compensation was payable to the mineral " owners for the loss to them occasioned by their being " prevented from working the minerals specified in the " appellants' counter-notices. It may be that the oversman " gave the respondents too much as the appellants contend, " or too little as the respondents seem to think. It may be

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(1) 4 F. (H. L.) 40, 42.

(2) 4 F. (H. L.) 40, 44; 87 L. T. 275, 276.

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"that he did not give due weight to the restriction which the "presence of the Crawley pipe had the effect of imposing on "the working of subjacent minerals. It may be that though "the matter was presented to him he disregarded that re-"striction altogether. It may be that the appellants put their "case far too high, as they did in the action before the Lord "Ordinary, and suffered in consequence. But the award on "the face of it is not open to objection." Lord Robertson said (1): "The contention, be it observed, is not and does not "involve any dispute that the respondents are owners of the "mineral for which compensation is claimed. On the "contrary, the argument is that they being proprietors are "losing the less from not working their minerals, because as "regards a part of those minerals they were already debarred "from working by their obligation to support the water-track. "The fact that the embargo on working is a legal one reduces "the value just as some physical obstacle might do, either "by adding to the cost of working, or even by rendering work "impossible." Lastly, Lord Lindley said (2): "The title "of the Clippens Oil Company to the minerals under the "pipe and their right to work them out cannot be denied, but "this title and right are subject to a restriction which affects "their value, for it appears that in some places either some "mineral must be left to support the Crawley pipe or some "expense must be incurred to prevent injury to it by sub-"sidence of the soil in which it lies. To what extent the "value of the minerals under the Crawley pipe is diminished "by this consideration is entirely a question for the "arbitrator." I make no apology for the extent of my citation of these opinions, which, in my opinion, can be applied in terms to the statutory restriction on working which is now imposed by s. 79A of the Act of 1923. It will be noted that the arbitrator's duty, as thus defined, involved the consideration—not of actual damage—but of potential damage involved in the hypothetical working of the minerals required to be left unworked. As Lord Lindley makes clear, the rule laid down in *Backhouse* v. *Bonomi* (3), and which was followed in *Darley Main Colliery Co.* v. *Mitchell* (4), and *West Leigh Colliery Co., Ld.* v. *Tunnicliffe & Hampson, Ld.* (5), is not applicable in the present issue.

(1) 4 F. (H. L.) 40, 50; 87 L. T. 275, 279.

(2) 4 F. (H. L.) 40, 52.

(3) (1861) 9 H. L. C. 503.

(4) 11 App. Cas. 127.

(5) [1908] A. C. 27.

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There can be no doubt that discussion and negotiation between the parties interested led to the new code which is enacted by the Act of 1923, in Part II. of the Act. I desire to stress the point that, with the exception of the leading s. 77, the whole fasciculus of sections in the Act of 1845, which was headed, " And with respect to mines lying under or near " the railway," is superseded by s. 15 of the Act of 1923, which substitutes fourteen new sections and three new schedules, which, along with the original s. 77, form a complete and integrated code, obviously closely balanced, and, in my opinion, it is not for the court to consider whether any individual provision of the code does justice to the one party interested or the other. The duty of the court is to construe the language used. I now turn to the material sections of the new code enacted by s. 15 of the Act of 1923, and which are made applicable to the appellants by s. 16. They are as follows :—" 78.—(1.) If the mineowner of minerals lying " under an area of protection as hereinafter defined is desirous " of working any such minerals, he shall give to the company " and also to the royalty owner (if any) notice of his intention " so to do at least thirty days before the commencement of the " working and on the receipt of such notice the company and " the royalty owner respectively may cause the minerals to " be inspected by any person appointed for the purpose by the " company or royalty owner as the case may be. (2.) If it " appears to the company that the working of any of the " minerals to which such notice relates will be likely to " damage the railway or works or any part thereof, the " company may, at any time after the receipt of such notice, " give a counter-notice to the mineowner requiring him to " leave unworked all or any part of such minerals, and the " counter-notice shall specify the minerals (hereinafter re" ferred to as the specified minerals) so required to be left " unworked and the particular portion of the railway or works " (hereinafter referred to as the protected works) for the " support of which the specified minerals are required to be left " unworked . . . . (4.) Where any such counter-notice has " been served on the mineowner, the specified minerals shall " not be worked or got after the service of the counter-notice, " and the company shall pay compensation to the mineowner " and the royalty owner (if any) for the loss caused by the " specified minerals being left unworked. (5.) The area of " protection in relation to any seam of minerals shall be the

" area comprising any railway or works of the company and " such a lateral distance therefrom, on all or both sides thereof, " as is equal at each point along the railway to one-half of the " depth of the seam at that point or forty yards, whichever be " the greater; and, when the said lateral distance exceeds " forty yards, the area of protection shall be divided into two " areas: (*a*) an inner area of protection consisting of the area " comprising the railway or works and a distance of forty " yards therefrom on all or both sides thereof: and (*b*) an outer " area of protection consisting of so much of the area of " protection as is not included in the inner area of protection. " 78A.—(1.) The compensation payable by the company to " the mineowner and the royalty owner respectively for the " loss caused by the specified minerals being left unworked " shall, in default of agreement, be determined by arbitration: " Provided that so far as such compensation is payable in " respect of the value of specified minerals—(i.) the com- " pensation payable to the mineowner and to the royalty " owner shall be separately assessed: (ii.) the compensation " payable to the mineowner shall be a sum for each ton of the " specified minerals, the rate per ton in the case of minerals " lying under the outer area of protection being one-third of " the rate which is or would be awarded in the case of minerals " lying under the inner area of protection: (iii.) the com- " pensation payable to the royalty owner shall be based on " the amount which would have been received from time to " time by way of royalty in respect of the specified minerals if " they had been worked out in the ordinary course, and the " royalties payable had been—(*a*) in the case of such of the " specified minerals as lie under the inner area of protection, " the same as those reserved by and payable under the lease " comprising the minerals and subsisting at the date of the " counter-notice; and (*b*) in the case of such of the specified " minerals as lie under the outer area of protection, one-third " of the royalties so reserved and payable with the addition to " such one-third of one penny per ton; (iv.) in every case the " arbitrator shall state in his award the tonnage of the specified " minerals on which his award is based." It should be noted that the payments to which the mineowner, on whom a counter-notice has been served, may become entitled under sub-s. 2 of s. 78A and s. 81, sub-s. 1 are not included in the compensation for loss caused by the specified minerals being left unworked which is provided by sub-s. 5 of s. 78 and sub-s. 1

of s. 78A. In contrast with the latter, such payments are not based on any hypothetical working of the specified minerals.

My Lords, I am clearly of opinion that the arbitrator can only assess the loss caused to the mineowner by the specified minerals being left unworked by proceeding on the basis of a hypothetical working of the specified minerals, and for this purpose he will require to ignore the counter-notice, but he cannot ignore the mineowner's notice of intention to work these very minerals within an area of protection. I am also clearly of opinion that he must take into account the statutory provisions of s. 79, which alone authorize the working of such minerals, and the provisions of s. 79A, which impose a statutory condition of any such working, and the operation of which would be bound to diminish the profit realizable from the winning of the minerals, and pro tanto to diminish the hypothetical loss in respect of which compensation is to be paid.

Before dealing more fully with s. 79A, I desire to deal with a construction of proviso (ii.) of sub-s. 1 of s. 78A which was maintained by the respondents and appears to have been accepted by both courts below. The effect of that construction is that regard is alone to be had to the value of minerals lying under the inner area, that the tonnage rate is alone to be ascertained on these minerals and that one-third of the rate so ascertained is to be applied to the tonnage of minerals lying under the outer area. With all respect to the learned judges, I am glad to feel bound to differ from their construction, which, exempli gratia, would mean, as the respondents' counsel admitted, that if none of the specified minerals lay under the inner area, but there were valuable minerals lying under the outer area, the mineowner would get no compensation. While such a situation might be unusual in the case of coal, it might more easily be found in the case of other minerals which are equally subject to these statutory provisions. I am clearly of opinion that the duty of the arbiter is to ascertain the value of the whole of the specified minerals, and to reduce that value to a rate per ton over the whole tonnage, and to apply 100 per cent. of that rate to the tonnage lying under the inner area, and one-third of that rate to the tonnage lying under the outer area. My construction is based on the language of the opening words of the proviso, and of provisoes (ii.) and (iv.). The other construction appears to treat the phrases "compensation payable" and "value" as co-terminous in meaning. For present purposes the

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material parts of ss. 79 and 79A are as follows :—" 79.—(1.) If " within thirty days from the service by a mineowner on the " company of a notice of intention to work any minerals no " counter-notice is served by the company, the mineowner may, " after the expiration of those thirty days, and until a counter- " notice is served, work any minerals to which the notice " relates, so, nevertheless, that the same be done in the manner " proper and necessary for the beneficial working thereof, and " according to the usual manner of working such minerals in the " district where the same shall be situated. Where a counter- " notice is served, whether before or after the expiration of the " said thirty days, and the counter-notice does not require the " mineowner to leave unworked the whole of the minerals to " which the notice relates, the foregoing provisions shall apply " to any minerals to which the notice relates which are not " specified minerals in like manner as if no such counter- " notice had been served . . . . 79A.—(1.) If a mineowner " works any minerals lying under any part of the area of " protection in the manner authorized by this Act, he shall " nevertheless become liable on demand by the company " (subject as hereinafter provided) to contribute towards the " expenses properly incurred, or to be incurred, by the company " from time to time thereafter in making good any damage " caused by such working to the railway or works of the " company (not being protected works comprised in any " counter-notice relating to such area of protection) the " appropriate percentage (if any) of those expenses, the " appropriate percentage being such as is specified in the First " Schedule to this Act according to the depth of the minerals " being so worked. (2.) The liability of a mineowner under " this section in respect of any part of the railway or works on " which such expenditure has been incurred shall not exceed " an aggregate sum equivalent to sixpence for each ton of the " commercially workable minerals, gotten or ungotten, in such " part of any seams as lies under the area ascertained as " respects the several seams in accordance with the rules " contained in the Second Schedule to this Act, being seams " which have been or are being worked under such area as " aforesaid : Provided that, in ascertaining such aggregate " sum as aforesaid, minerals gotten more than six years before " the date on which a contribution shall have been demanded " by the company under this section shall not be reckoned. " (3.) Any mineowner making a contribution under this "section, who is a lessee, shall be entitled to deduct from any "royalties then or thereafter becoming due from him to the "royalty owner under the lease, one-third part of the amount "which he has so contributed as aforesaid, subject, however, "to this limitation: that if the royalty payable by the mine-"owner under his lease is at the rate of less than sixpence per "ton, the amount deducted shall not exceed the amount pro-"duced by multiplying one-third of such rate per ton by the "tonnage of the minerals with reference to the aggregate "amount of which the maximum liability of the mineowner is "to be so calculated as aforesaid; and, where the mineowner "is entitled to make such a deduction, the sum reserved by "and payable under the lease shall be deemed to be the net "amount arrived at after making the deduction: Provided "that no such deduction shall be allowed when the liability of "the mineowner to the company is a liability arising out of an "arrangement between the mineowner and the company with "respect to the working of minerals under or near the railway "or works. (4.) The liability of a mineowner under this "section shall be subject to the following further limitation as "respects damage done by workings in any single mine, that "is to say, that when the aggregate of the sums paid by the "mineowner in satisfaction of such liability amounts to a "sum equivalent to sixpence for each ton of commercially "workable minerals, gotten or ungotten, in such part of any "seams as lies within the mine and under an area extending "laterally on both sides of the railway or works to a distance "ascertained in accordance with Rule 1 of the said Second "Schedule and extending longitudinally to a distance co-"extensive with the portion of the railway lying over or "adjacent to the mine, being seams which have been or are "being worked under such area as aforesaid, the mineowner "shall not be liable to make any further contribution under this "section towards the expenses of making good any damage "caused to any part of the railway or works by the working of "such seams as aforesaid in that mine. For the purposes of "this provision, all the minerals which the mineowner is "entitled to work, and which have been, or would in the "ordinary course of events, and in accordance with good "mining practice be, worked from the same shafts or adits "shall be deemed to be a single mine. Where the liability of "a mineowner under sub-s. (2.) of this section is reduced by "the operation of this sub-section, the right of the mine-

" owner under sub-s. (3.) thereof to make deductions from " royalties shall be proportionately reduced." Under sub-s. 5 of s. 79A, any dispute as to contributions or the deductions from royalties are to be settled by arbitration. Under s. 79B provision is made that, " when and so far as reasonable and " practicable," the company is to send to the mineowner and the royalty owner (if any) particulars of the railway or works to which damage has occurred or is apprehended, the nature of the damage or apprehended damage, and the nature of the works intended to be carried out, and, further, that the company is to keep separate accounts of the cost of making good any such damage, open for inspection by the mineowner or the royalty owner (if any).

In the Court of Appeal, MacKinnon L.J. said (1) : " I prefer, " however, to rest my conclusion on the simpler and broader " ground that, in estimating ' value ' under s. 78A it is not " possible to estimate the prospective and hypothetical " liability under s. 79A." If that were a correct view, it would be a sufficient ground for deciding against the appellants ; but counsel for the respondents—rightly, in my view—found himself unable to support that contention. On the contrary, his submission was that the attempt by the arbitrator to arrive at the hypothetical liability under s. 79A involved a catena of difficulties—especially in the case of a single mine—which really made such an assessment amount to an impossibility. This is not precisely the way in which the learned Master of the Rolls and Luxmoore L.J. expressed it ; as I understand their judgment, they held that the assessment of the potential liability was so complicated and difficult that (2) : " It appears " to us to be in the highest degree unlikely that the legislature " would have imposed such a task on the arbitrator without " express language to that effect." My Lords, as I have stated already, the phrase " loss caused by the specified minerals being " left unworked " naturally involves that this potential liability, if assessable, should be deducted as an expense of the hypothetical winning of the specified minerals, and, if it were intended to exclude it, it was necessary to make express provision for such exclusion. Further, in legislation such as the present, I should distrust the usefulness of the well-worn phrase " the " intention of Parliament " ; if Parliament had any intention, it would be more likely to involve abstention from interfering

(1) [1944] Ch. 243, 262. (2) Ibid. 256.

with the nicely-balanced compromise which had been arrived at by the parties interested.

I turn then to the suggested difficulty alleged to amount to impossibility :—Counsel for the respondents conceded that mere difficulty in assessment was not enough, and that a reasonable assessment, though not made with certainty, was as much within the province of the arbitrator in assessment of compensation as within the province of a jury in assessment of damages. I may refer to *Chaplin* v. *Hicks* (1), per Vaughan Williams L.J. He further agreed that, in any view, the arbitrator would require to consider, not what was the value of the coal at the date of the counter-notice, but what would the coalowners, if they had not been prohibited, have made out of the coal during the time it would have taken them to get it. (*Bwllfa and Merthyr Dare Steam Collieries (1891), Ld.* v. *Pontypridd Waterworks Co.* (2). As Lord Robertson states : " Any " estimate of this profit necessarily involves the question, " ' How long would the coal in question take to work out ? ' " if for no other reason than in order to compute the cost of " working. If the question thus presented has to be solved " ab ante, the arbitrator, or whoever has to deal with it, " must form the best conjecture he can of probable prices and " probable wages during the period required to work out the " area in question." It appears clear to me that, while there may be cases in which the arbitrator might find himself unable to form a reasonable conjecture as to the potential liability under s. 79A—in which case he would make no deduction in respect thereof—there will certainly be cases, of which the present case may well be an example, in which every mining expert would agree that any further substantial working of the specified minerals would almost certainly involve damage to the protected works, and I fail to see that the arbitrator would not be in much the same position as an arbitrator under sub-s. 6 of s. 79A might be, for I regret to have to differ from the learned judges' view that liability under s. 79A arises when and only when damage is actually caused. It would be surprising if that were the correct construction, but I am satisfied, especially when the provisions of s. 79B are considered, that apprehension of damage and the cost of works to be carried out for the purpose of preventing such apprehended damage are covered by both sections. This is clearly stated in sub-s. 1 of s. 79B, and in sub-s. 2 of s. 79B the general phrase " making

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(1) [1911] 2 K. B. 786, 792.

(2) [1903] A. C. 426, 432.

"good any damage caused to the railway or works" is used, which corresponds to the language of sub-s. 1 of s. 79A. In the class of case to which I refer the arbitrator would be able to make a reasonable conjecture as to the date at or about which the damage might be reasonably apprehended, and the limit as to minerals gotten more than six years prior thereto could be taken into account by the arbitrator. Again, as regards the element of ungotten minerals in sub-ss. 2 and 4 of s. 79A, I fail to see any reason why the arbitrator in the present case would be in any worse position as regards available information than the arbitrator under sub-s. 6 of that section, and, under sub-s. 4, the consideration of future workings referred to in the penultimate paragraph of the sub-section is common to both types of arbitration. Equally, I am unable to see any difference in the complexity of the task of making an allowance for the portion of the mineowner's contribution which he could have passed on to the royalty owner (if any), except that precision might be expected from the arbitrator under sub-s. 6 of s. 79A. It may be well to remember that it is the risk of damage and the necessity of its prevention that induces the service of a counter-notice. The only point, in my opinion, that may present doubt does not concern the present arbitration, namely, the right of the mineowner in any future demand for a statutory contribution under s. 79A, to claim credit for the potential contribution taken into account in assessing the present compensation. I do not propose to anticipate the decision of such a future claim. It is enough for me to say that the present arbitration merely involves the adoption of a hypothetical basis for assessing the compensation payable by the appellants, and that, even if the future claim of the mineowner to credit for any hypothetical deduction in the present arbitration would rightly be rejected, that is no adequate reason for now awarding the mineowner compensation for a profit which he would not have gained, and therefore he has not lost by the embargo. Finally, I may add that a somewhat parallel case might arise under sub-s. 2 of s. 85B, where a counter-notice has been served on a mineowner who has an antecedent right to let down the surface subject to payment of compensation. It seems clear to me that the same question as to hypothetical damage by the hypothetical working would arise, and it is difficult to assume that such a mineowner with a qualified right to let down the surface is to be entitled to the same amount of compensation as he would have been entitled to if his right had been unqualified. Indeed, this case seems also to be covered by the *Clippens* case (1). Such cases support the reasonableness of the construction I feel bound to place on the language used in sub-s. 5 of s. 78 and sub-s. 1 of s. 78A; also the ability of the parties to agree the figures in the present case seems to lend similar support. On the whole matter, I am of opinion that the appeal should be allowed with costs, that the judgment of the Court of Appeal should be set aside, and that the first question raised by the originating summons should be answered in the affirmative in terms of the declaration granted by the judgment of Morton J., and, further, that the respondents should pay the present appellants' costs in the courts below.

LORD MACMILLAN. My Lords, the history and the contents of the legislation with which this appeal is concerned have been so fully and so clearly set out in the judgment of the learned Master of the Rolls and Luxmoore L.J., that I need do no more than give such an outline as is necessary to place the question at issue in its setting. When a railway company acquires land for the purposes of its undertaking the subjacent minerals are in the ordinary case excepted from the title which it obtains. The reciprocal rights and duties of the railway company and the owner of the excepted minerals are thenceforth regulated by what is known as the "mining code," embodied in the Railways Clauses Consolidation Act, 1845, as amended by the Mines (Working Facilities and Support) Act, 1923. Broadly stated, the resulting position is that the mineowner or his lessee, if he be desirous of working the minerals within a prescribed distance of the railway, known as the "area of protection," must give notice to the railway company of his intention to do so. The railway company has then two alternative courses open to it. It may disregard the notice and take no action, whereupon the mineowner may proceed to work and win the minerals to which his notice applies; or, if the railway company apprehends damage to its undertaking from the proposed workings, it may serve on the mineowner a counter-notice requiring him to leave unworked all or any part of the minerals in question and stating the particular portion of the railway or its works for the support of which the "specified minerals" (as they are denominated) are required to be left unworked. The effect of the service of such a counter-

(1) 4 F. (H. L.) 40.

notice on the mineowner is to prevent him thereafter from working the specified minerals and to entitle him to be compensated by the railway company " for the loss caused by the " specified minerals being left unworked." If the railway company serves no counter-notice the mineowner is entitled to proceed to work the minerals as to which he has given notice to the railway company, free from any obligation to support the railway or its works. But this right is not unqualified. If the mineowner in working the minerals within the railway's area of protection does damage to the railway or its works, he is liable to make a contribution up to a prescribed maximum and under certain conditions to the expense incurred by the railway company in making good such damage. Failing agreement, the amount of the compensation payable by the railway company to the mineowner for leaving minerals unworked and the amount of the expense of making good damage to the railway to which the mineowner must contribute if he is not interpelled from working, are to be determined by arbitration. The question posed in the originating summons in the present case, upon which your Lordships have now to pronounce, is whether, when a railway company has served on the mineowner a counter-notice requiring specified minerals to be left unworked, account ought to be taken, in assessing the compensation to be paid to the mineowner, of the statutory liability which he would have incurred to contribute to the cost of making good surface damage if he had worked the minerals and thereby caused damage to the railway or its works. Morton J. has answered the question in the affirmative, the Court of Appeal in the negative. The facts are simple. A portion of the railway line of the appellants, the London & North Eastern Ry. Co., in Nottinghamshire, runs in a tunnel, known as the Mapperley Tunnel, above a seam of coal designated the Low Hazel Seam. The coal is excepted from the railway company's title and the respondent colliery company, within whose lease or ownership the Low Hazel Seam is included, has intimated its intention to work the seam within the railway company's area of protection. The railway company has replied with a counter-notice requiring the seam to be left unworked within a specified area for the support of the tunnel. It is agreed that the colliery company is entitled to be compensated for the loss occasioned by this embargo, and the amount of the compensation has also been agreed subject now only to the determination of the question which

I have above stated. If the question is answered in the affirmative the parties are agreed on the figure to be deducted.

Apart altogether from the special provisions of the mining code, I should think it indisputable that the value of a coal seam to the mineowner or his lessee must be affected by the consideration whether he is liable for surface damage or not, and that if he is liable for surface damage to any extent this factor must affect the profit which he can make by working the seam. As Lord Robertson pointed out in his speech in the case of the *Edinburgh and District Water Trustees* v. *Clippens Oil Co., Ld.* (1), any limitation, physical or legal, which affects an owner in the free use of his property " goes to diminish value." I have now to consider whether this does or does not apply in the present case, in view of the special statutory provisions which govern the matter. The measure of the compensation to be paid to the mineowner cannot in my opinion be better expressed than it was by Lord Macnaghten in *Bwllfa and Merthyr Dare Steam Collieries (1891), Ld.* v. *Pontypridd Waterworks Co.* (2), namely, that " so far as money can compensate him he is to be placed in the position in which he " would have been if he had been free to go on working." If the railway company in the present instance had served no counter notice, the respondents would have been free to go on working. The statute by s. 79, sub-s. 1, expressly authorizes them to do so in that event. But the statute in the very next section goes on to enact that if the mineowner does, in the exercise of that authority, work the minerals, he is to be liable to make a contribution towards the expense of making good any damage which his workings may cause to the railway or its works. The hypothesis being that the mineowner is to receive by way of compensation for not working the minerals what he would have made by working them, I am at a loss to understand why a potential liability to which he would have been subject had he worked them should be disregarded in assessing the compensation due to him.

In the original legislation of 1845 there was no provision corresponding to s. 79A, which is the section of the Act of 1923 giving the railway company the right to claim a contribution to the expense of making good damage caused by workings which it has not stopped by counter-notice. It is important to bear in mind the circumstances which led to this alteration of the law. It was in consequence of the decision in the case of

(1) 4 F. (H. L.) 40, 50.

(2) [1903] A. C. 426, 431.

the *Howley Park Coal and Cannel Co.* v. *London & North Western Ry. Co.* (1), and the great increase in deep mineral workings in modern times that the railway companies and the mineowners agreed in recognizing the inadequacy of the then existing code to do justice to either interest. The consequent negotiations resulted in a compromise which is embodied in the elaborate expansion and alterations of the original code, to which the Act of 1923 gave legislative sanction. Like most compromises it is a compound of gives and takes and a high degree of logicality is not to be expected of it. This genesis of the revised mining code has in my view a not unimportant bearing on its interpretation. The main arguments adduced on behalf of the respondents were that s. 79A, dealing with what I may call the potential liability contribution, was entirely unrelated to ss. 78 and 78A, which deal with compensation; that s. 79A applied only where there were actual workings; and that any attempt to apply the section to hypothetical workings led to such inextricable difficulties and anomalies that Parliament cannot be assumed to have intended that it should be so applied. As regards the first of these submissions I would point out that the code as it stands, like the compromise which it embodies, is a self-contained whole. No one can say which part of it was the consideration for any other part. The mutual rights and duties created are so interwoven as to be inseparable. The topic of compensation is not finally disposed of in ss. 78 and 78A. Thus s. 81, subsequent to s. 79A, gives the mineowner further compensation for losses due to severance if he is interpelled from working the specified minerals. Then as regards the other submissions, I fully recognize that the mineowner's potential liability to contribute to the cost of making good surface damage is hedged about with qualifications and conditions of the most complex character. Notwithstanding these complexities it is of course accepted that s. 79A must receive effect in the case where the mineowner actually works the minerals and damages the railway. But to apply it to the case of the hypothetical working on which compensation is based is said to be impracticable. Parliament, it was argued, cannot have meant to impose an impossible problem on the parties or the arbitrator and therefore the statute must be construed as not imposing it. I hope I yield to none in my respect for the wisdom of Parliament, but I am not disposed to make a fetish of it, least of all in such a case as the present, where I take leave to doubt if the intricate provisions which have perplexed your Lordships for several days were any clearer to the minds of the legislature, which was doubtless content to accept and enact what the parties interested had agreed. It is always a legitimate and sometimes a cogent argument that Parliament could not have intended to enact a measure leading to unreasonable or impracticable results and that any admissible reading which avoids such results ought to be preferred. But a prolonged acquaintance with at least one branch of legislation, namely, that which relates to income tax, has engendered in my mind a pardonable scepticism of the doctrine that Parliament must be taken always to have foreseen all the possible consequences of its enactments and to have avoided every possible cul-de-sac. After all, it is with what a statute says that the courts have to deal. If I am right in holding, in Lord Macnaghten's words, that in assessing the compensation the mineowner must " be placed in the position in which he would have " been if he had been free to go on working," then the statute in terms says that that position involves a potential liability to contribute to the expense of making good surface damage. Difficulty of assessing damage affords no justification for denying the right to reparation if it exists. No right can be more problematical than one which depends upon the liberum arbitrium of a third party, for nothing is more incalculable than what a third party may do. But in *Chaplin* v. *Hicks* (1), which was such a case, the court held that this afforded no reason for denying the existence of the right or the possibility of assessing the remedy. I refer to, without quoting, the well-known judgment of Vaughan Williams L.J. What more incalculable problem could there be than that of assessing in money the value of the loss of expectation of life ? Yet Parliament has required the courts to brace themselves to the performance of this task. It may be that a right may be so conditioned that the party complaining of a breach of it may be unable to substantiate his claim of damages, but that does not destroy his right to have his claim considered.

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(1) [1913] A. C. 11.

In the view which I take I do not find it necessary to pursue the analysis to which with relentless logic the learned Master of the Rolls and Luxmoore L.J. have subjected the detailed provisions of the Act. I have endeavoured to follow it, not always, I fear, with complete success or with complete agreement. Thus I do not accept the reading of s. 78A which they adopt and which would exclude any separate ascertainment of the value of the minerals in the outer area of protection. A merely arithmetical assessment of the value of the minerals in that area by taking one-third of a rate per ton arrived at from a valuation of the minerals in the inner area might have the most unjust results. An argument suggested against the applicability of s. 79A in computing compensation was that it would be impossible to ascertain from a lump sum award how much had been given under this head, so that it would not be possible in dealing with any future claim to know whether the sixpenny maximum had already been reached. Express provision, however, is made in sub-s. 6 of s. 79A for the settlement by arbitration of any dispute as to the amount of the mineowner's contribution towards the expense of making good surface damage, and the difficulty suggested might thus perhaps be met. Assuming, as I do, that the ascertainment of the mineowner's contribution under s. 79A is beset with perplexing difficulties and anomalies in the case of hypothetical workings, I do not think that the total disregard of this element in the assessment of compensation for non-working is thereby justified. It may be that in a particular case the parties may agree, or the arbitrator may award, that little or nothing should be given or has been proved under this head, but I cannot hold them absolved from addressing themselves to the problem. Difficulties which seem so formidable to the legal mind may prove less so to the expert accustomed to deal practically with the intricate problems of mineral working. It is a permissible comment that the parties themselves seem to have been able to achieve what one of them has sought to convince your Lordships was impracticable, for we are told in the memorandum of agreement in the case that they have agreed upon the precise sum—and it is not a round sum—which should be deducted as representing the potential liability under s. 79A if it is held to justify a deduction. I am accordingly in favour of allowing the appeal and restoring the judgment of Morton J.

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(1) [1911] 2 K. B. 786.

LORD WRIGHT (read by LORD THANKERTON). My Lords, the question for decision in this appeal is what is the true construction of the provisions contained in s. 15 of the Mines (Working Facilities and Support) Act, 1923, in so far as they relate to the amount of compensation payable by a railway company to a mineowner for the loss caused to such mineowner by specified minerals being unworked by reason of the railway company having required these minerals to be left unworked. On the broad question of the compensation, no dispute arises. An amount has been agreed. But the contest is whether account should be taken, by way of deduction from the gross amount, of a particular and subsidiary item which the appellant claims should be deducted under the provisions of the Act of 1923. These provisions I shall refer to as the mining code or the code. They form a compact set of rules for the direction of arbitrators in such matters. They are undoubtedly difficult to understand for laymen not versed in the abstruse and technical science and art of mining. The present proceeding was commenced by an originating summons which stated the issue as a question of construction of the code. No evidence was called. Morton J., in the first court, decided in favour of the appellants. His decision was reversed by the Court of Appeal. The solution of the question depends on the language of the code, which substantially changed the law and varied the former rules regulating the relationship between railway companies and colliery companies in regard to coal lying under the railway works. The code established a materially different scheme for securing on the one hand the protection of the railway company against the risk of its line and works being let down by the coal being removed and on the other hand for securing compensation for the mineowner if loss is caused to him because he is prevented from working the coal. The code is embodied in ss. 78 to 85E which by s. 15 of the Act of 1923 are substituted for ss. 78 to 85 of the Railways Clauses Consolidation Act, 1845. The code itself is self-contained and complete, save as expressly varied by any special Act or agreement. Subject to what it provides, it relieves the mineowner from liability to leave support either inside or outside the area of protection, a term which I shall later explain, and entitles him to remove such support without being, save as the code provides, liable to pay compensation for damage caused to the railway and its works, so long as the removal is done in the proper and usual manner. It is common ground that the code, though enacted by the legislature and embodied in the statute, was the result of an agreement between the parties interested, in particular, mineowners and railway companies and royalty owners. It bears indications that it has been reached by a compromise. Its provisions appear in places arbitrary and artificial, but if the language is sufficiently clear, it must receive the effect which business men might fairly attribute to it. Details are in general left to be settled by agreement or arbitration. The matters are technical and abstruse, and the court cannot substitute its own ideas of what is reasonable for the compromise as reached and expressed by the interests concerned and sanctioned by the legislature.

The code has been set out fully by my noble and learned friend Lord Thankerton. I merely refer to a few sections. In s. 78 it defines " an area of protection " in relation to any seam of minerals, a term which includes coal. That area has relation to the " protected " works for the support of which the " specified " minerals, that is, specified in the counter-notice next referred to, are to be left unworked. The area is divided into (*a*) an inner area consisting of the area of the railway or works and a distance of forty yards beyond on each and all sides and (*b*) an outer area beyond the inner area and extending therefrom at each point to a point beyond at a distance of one half the depth of the seam at that point. If a mineowner desires to work the minerals under an area of protection he may serve notice of his intention to do so on the railway company. The latter may serve a counter-notice requiring the mineowner to leave the minerals or some particular part thereof unworked. Thereupon the minerals so specified may not be worked and the company " shall pay compensation to the mineowner for " the loss caused by the specified minerals being left unworked." I omit here provisions for the protection of the royalty owner (if any). The next section, 78A, provides that the compensation for the loss due to coal being left unworked under s. 78 is to be determined by arbitration in default of agreement. Obviously a great deal is thus left to the judgment of the arbitrator. There is added the proviso " that so far as such compensation " is payable in respect of the value of specified minerals " [that is specified in the counter-notice] . . . . " (ii.) the " compensation payable to the mineowner shall be a sum for " each ton of the specified minerals, the rate per ton in the case " of minerals lying under the outer area of protection being " one-third of the rate which is or would be awarded in the case " of minerals lying under the inner area of protection ; . . . . " (iv.) in every case the arbitrator shall state in his award the " tonnage of the specified minerals on which his award is " based." A question of construction is raised by these words. It was held in the Court of Appeal that all that they required the arbitrator to do was to value each ton of the specified coal in the inner area and then apply one-third of that rate to the

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tonnage in the outer area. There is here a specific direction to the arbitrator which must be construed. But I do not agree with the construction adopted by the Court of Appeal. The words seem to me to require each ton of the specified minerals to be valued, but the rate of compensation per ton in the outer area is to be one-third of the rate which is or would be awarded " in the case of minerals lying under the inner area." When the arbitrator comes to value the coal in the outer area he is in my opinion directed to find what he would award for each ton of coal if it had lain in the inner area and then divide it by three. This seems to accord with good sense, because it is clear that the values of the coal in the two areas may differ. For instance, there may be poor coal or little or no coal in the inner area, whereas the coal in the outer area may be of much higher quality. I shall later observe how the judgment of the Court of Appeal depends in part on their construction of this crucial section. Apart from this question of construction, the section is fairly clear, though it leaves much scope for the arbitrator's decision in regard to detailed figures. The value is to be assessed by calculating what the coal would have realized if it had been brought to market in the usual course and deducting outlays. But it will never be marketed or turned into coal because of the counter-notice which " sterilizes " it. The arbitrator must then, in order to get the net value, work on hypothetical figures of prices realized and outlays incurred. So far the arbitrator can use his experience of the ordinary course of business and of working. But now comes the crux of the case. That centres round s. 79A, which I must now examine. Sections 78 and 78A provide for cases where the notice has been followed by a counter-notice. Section 79 deals with a case in which no counter-notice is given. While that state of things lasts, the mineowner is free to work the coal included in the notice, working of course in the proper manner. But s. 79A introduces a further item. The mineowner is doing what he is not debarred from doing by a counter-notice, though he is working coal within the area of protection, but he is nevertheless " liable in respect of damage caused by such work-" ing to the company's railway or works " because, even though he is working in the authorized manner the section requires him to contribute " on demand " to the extent defined by it towards expenses properly incurred or to be incurred in making good damage so caused. The amount of this contribution is to be determined by arbitration.

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The Court of Appeal held as a matter of construction that s. 79A is a separate part of the code distinct from the earlier sections, in particular s. 78A, which deals with compensation. I cannot accept this construction. The whole code can and ought to be read together as dealing in different sections with different aspects of the regulation of rights and liabilities connected with working or not working coal in a "protected" area. Section 79 introduces the case where no counter-notice is given, so that the mineowner is free to work the coal. But as he is working coal in a "protected" area, there is a danger that the removal of the supporting coal may lead to subsidence and damage. Section 79A imposes a potential liability to contribute if the damage ensues. There is no need to "marry" these different parts of the code; they dovetail as parts of an integrated whole. But then the Court of Appeal has emphasized that s. 79A only imposes the liability to contribute if there were damage actually caused to the working, whereas what the arbitrator was, according to the appellant's contention, asked to do was to take account of a purely hypothetical risk of damage due to the hypothetical working of the "sterilized" coal, and pro tanto reducing its net value. That is true, but it is equally true of the calculation of the value in all its aspects, for instance, the hypothetical outlays necessary to get the hypothetical value of the unworked and legally unworkable coal. I suppose that as a matter of business a mineowner who was considering whether to work coal under protected works not comprised in a counter-notice within the words of s. 78A, sub-s. 1, would want to have before him all relevant estimates, including a figure to cover the potential risk of contribution under the section. I cannot see why the same should not be true of an arbitrator valuing the loss caused by the specified minerals being left unworked under ss. 78 and 78A. The matter is not disposed of by saying that it is all notional and hypothetical. So is the whole thing. The problem is the not uncommon problem of ascertaining what would be the position if something had happened which did not happen. But the respondents have also relied on certain anomalies or inconsistencies or impossibilities which, as they contend, would be involved in the decision of the learned judge. I do not doubt that there may always be difficulties wherever it is necessary to solve the problem of attempting to reconstruct future possibilities in order to ascertain the value of an existing right, in particular a right to compensation or damages. There are two separate questions in these cases to be considered. First, whether the right or liability is established? Secondly, if it does exist, is it possible to assign any definite and appreciable value to it? In the Court of Appeal MacKinnon L.J. held that in the present case it is impossible to evaluate the chance of having to pay contribution under s. 79A, and thence that it must be disregarded even though the mere words of the code would require it to be taken into account as an element in determining the value under s. 78A. The majority of the court did not go so far but treated the difficulties which they thought were inevitable as a ground for not construing the code so as to require the potential liability to be brought into account.

The scale of contributions based on depths of workings which is set out in the first schedule to the Act contains some complicated provisions fixing limits of total liability to contribute which I need not particularize, because what is material here is that though the mine owner is properly working the coal within the area of protection he necessarily comes under a potential liability which, however, may never materialize if no damage is caused to the railway or the railway works. The question thus arises whether an arbitrator fixing the value of the coal necessarily left unworked under the provisions of s. 78A, and doing so by a notional estimate of the hypothetical market value of coal brought to market, subject to deduction of the notional debits, is to include in the debits some estimate of the value of this notional liability for damage, which must necessarily have arisen if the coal had actually been worked. Morton J. held that this potential liability was as much a debit element to be taken into account in calculating the value of the coal as the equally notional expenses of the hypothetical but legally impossible working. The potential liability to contribute is a liability which must be incurred if the coal is worked. There is logically nothing to prevent an arbitrator, presumably skilled and expert in mining engineering, from fixing a figure of the money value of the liability in the same way as if he were asked to do so by a mineowner who before starting to work in fact in the protected area wanted to have an estimate of the potential liability. The Court of Appeal have taken a different view and have excluded the item. The majority of the court held that so heavy a burden could not be imposed on the arbitrator without express words; it could not be imposed merely by an " implication " from the use of the word " value "

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in s. 78A. MacKinnon L.J. went further and was of opinion that the task was impossible and could not be deemed to have been imposed. Neither view ought in my opinion to be adopted. Before I deal with the particular reasons given to show the practical impossibility, which I do not accept, I venture to think that a fallacy in law is involved in the respondents' argument. As a general principle of law a right or liability is not destroyed because its value cannot be calculated or estimated with any approach to mathematical precision. The question here is whether the contingent risk of having to make compensation is an element of deduction. In my opinion it is, by the express words of the code and not as a matter of implication, because it is an item of deduction necessarily included under the word " value " in virtue of s. 78A. In my opinion there is a positive though contingent and future liability expressly imposed if the coal is worked. Its " value " is left to the arbitrator to decide, if the parties do not agree it. As with other questions of compensation the code expressly leaves the value to be settled by arbitration, presumably by mining engineers or other experienced and instructed experts in the particular art and science. They must use their peritiam artis to evaluate the future contingencies and to picture the possibilities which appertain to the underground coal. They may think the risk of damage is too problematical to be given any but a nugatory value or they may value it at a substantial figure. There can be no certainty in such matters but they must do the best they can. Their decision for all practical purposes cannot be questioned. They must be left to decide according to their judgment of what would be done in the usual course of events, for instance, whether the particular volition or decision of the mine manager in the natural course of events would be that the seam should be worked at all, or if worked, when it would be worked, and so on. The problem is not unlike the problems which constantly arise at common law in estimating damages, for instance, damages for breach of contract or for tortious acts. These damages often have to be based on future probabilities which may include consequences such as the choice or volition, however capricious, of third parties. As an instance I may refer to the judgments of the Court of Appeal in *Chaplin* v. *Hicks* (1) where the breach of contract deprived the plaintiff of her chance of winning a prize in a beauty contest. Pickford J. entered judgment for 100*l*., the amount of damages found by the jury, and was upheld by the Court of Appeal. I quote some brief statements of principle contained in the court's judgments. Vaughan Williams L.J. said (1): "The jury must do the best they can, and it may be that the "amount of their verdict will really be a matter of guesswork. "But the fact that damages cannot be assessed with certainty "does not relieve the wrongdoer of the necessity of paying "damages for his breach of contract." Similarly Farwell L.J. said (2): "In my opinion the existence of a contingency, "which is dependent on the volition of a third person, is not "enough to justify us in saying that the damages are incapable "of assessment." These principles which were there applied to damages for breach of a contract apply equally to the ascertainment of the sum (if any) to be taken into account in estimating the potential statutory liability under s. 78A: the problem is indeed simpler in the latter case in the sense that there is no issue of remoteness or causation. The contingent liability which is expressly, as I think, imposed, cannot in law be nullified by the assumed difficulty or impossibility of giving a figure of value to it. Nor can that difficulty or impossibility be a ground for deciding that the liability is not imposed in the notional or hypothetical sense which I have already explained. But I am not satisfied that the Court of Appeal were justified in their opinion that the impugned item was not reasonably possible of ascertainment by an arbitrator. It would be so no doubt to a judge unassisted by expert evidence. But it is a different matter where the valuation is made by the expert. Even if his decision might be said to be a sort of guesswork, it would be the result of scientific and enlightened guesswork. That to my mind is what the code anticipates. I should have arrived at this conclusion apart from the admitted fact that the parties agreed in writing that if the potential liability under s. 79A is to be taken into account the aggregate amount of compensation would have to be reduced by the precise figure of 2,324*l*. In the Court of Appeal it was said that the agreed sum must have been arrived at by a purely arbitrary compromise based on conflicting guesswork. I have however no reason to doubt that the figure was seriously agreed as a fair valuation and was as such accepted by the parties, who presumably knew their business. If so, it at least throws doubt on the suggested impossibility of forming any estimate at all, even though some of the detailed estimates required by the

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(1) [1911] 2 K. B. 786.

(1) [1911] 2 K. B. 792. (2) Ibid. 799.

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code are very complicated and difficult. But I am not convinced that the problem of this particular valuation differs in principle from the problems which constantly confront courts and business men in valuing in pounds shillings and pence future uncertainties. I have considered very carefully the various reasons expounded in the judgment of the Court of Appeal before the House by counsel for the respondents. I am content to indicate briefly how I regard one or two of the objections.

One principal objection relied on as showing the unfair or illogical nature of the appellants' case is based on the construction of s. 78A, sub-s. 1, proviso (ii.), which the Court of Appeal accepted. According to this construction the arbitrator only values each ton in the inner area and makes no separate value of the coal in the outer area. On that footing, it is said, it would be impossible to estimate the contribution to notional damage by working the outer area. But as I have already explained I do not agree with the suggested construction. The arbitrator has to deal with each ton both in the outer and in the inner area, as I read the provision, and estimate the probability of the notional damage to the particular works in each part of the protected area. It is for him to do this as best he can and no doubt he would be equal to the task. I think this particular objection fails. As to provisions in s. 78A, sub-s. 1 (ii.), distinguishing between the compensation in the inner and outer areas, they certainly appear artificial and arbitrary but so is the whole scheme. They can, however, be construed and an arbitrator is capable of giving effect to them as specific directions. There are also presumably special reasons for bringing the royalty owner into the arbitration under s. 79A. These provisions in any case are clear enough. It is also objected that ss. 79A and 79B relate to actual damage only, and cannot apply to notional or contingent damage. But the whole inquiry under these sections, both 78A and 79A, is notional. In the same way s. 79B, which requires a railway company to give particulars of actual or apprehended damage within the terms of s. 79, cannot be carried out in fact where the working is never done or damage caused in fact. But s. 79B is not in any event a condition even of actual liability in fact. An arbitrator dealing with the notional problem may have to bear in mind the terms of s. 79B and give such effect, if any, as he might think proper to it in his notional calculation.

The whole conception of calculating the notional position under the code on the assumption that coal was worked though it was never in fact worked, and the application to such a notional position of the complicated and arbitrary rules set out in the code, is undoubtedly very difficult, but I can see no adequate reason for the view that the purpose of the legislature, or of the business interests which framed the compromise scheme embodied in the code, is not sufficiently clear to enable an arbitrator to give effect to it. Where legislation is ambiguous, it may be a sufficient reason for construing it in a particular way that the other possible way would lead to something impossible or irrational, but the legislation in question is not, as I think, ambiguous. Similarly, if it is a question of implying what is not expressed, the implication may be rejected where it would lead to inconvenient or improbable results. In my opinion, however, the code, though difficult, is not ambiguous, but is expressed with sufficient clearness. I should allow the appeal and restore the judgment of Morton J.

LORD SIMONDS. My Lords, I would dismiss this appeal. The question for your Lordships' decision is one of construction of certain sections of the Mines (Working Facilities and Support) Act, 1923. The relevant provisions of this Act have already been sufficiently stated by my noble and learned friend Lord Thankerton, as have the few and indisputable facts of the present case. I do not think it necessary to restate them. The question is accurately put in the summons with which these proceedings originated. It is whether, on the true construction of s. 15 of the Act, and in particular ss. 78 and 78A included in that section, in assessing the compensation payable by the London & North Eastern Ry. Co. (the appellants, whom I will call " the railway company ") to B. A. Collieries, Ld. (the respondents, whom I will call " the mineowner "), under the counter-notice dated December 30, 1940, given by the railway company to the mineowner, any account ought to be taken of the possible contribution for which the mineowner might in the future have become liable under s. 79A if the coal covered by such counter-notice had been actually worked and damage to the railway and works of the railway company had been caused by such working. This question was answered in the affirmative by Morton J. and in the negative by the unanimous judgment of the Court of Appeal.

In the consideration of the complicated provisions of the Act now under review it is necessary to bear in mind the state of the law at the time of its enactment. Here, again, I need not repeat matter of common knowledge, to which reference has already been made. It had for many years before 1923 been clear that the so-called mining code provided by ss. 77 to 85 of the Railways Clauses Consolidation Act, 1845, made inadequate provision for the conflicting needs and interests of railway companies or other statutory undertakings on the one hand and of mineowners on the other. Amendment of the law was seen to be necessary even before the decision in the *Howley Park* case (1). The necessity was emphasized by that decision, which prevented the mineowner from working his minerals outside the prescribed area in such manner as to deprive a railway company of lateral support without giving him the compensation to which a similar prohibition within the prescribed area would normally have entitled him. Opportunity was thus taken in the Act of 1923 (which dealt also with other matters of grave public importance in the mining industry) to substitute for the old mining code a new set of provisions which would, in the light of eighty years' experience of the development of the mining industry and of the working of the old code, adjust the rival claims of railway company and mineowner. The Act of 1923 is a public general Act. But it is common ground that the sections now under consideration may be regarded as embodying a compromise reached by the interested parties which, as in the case of private Acts, the legislature is generally content to leave untouched so long as no public interest is adversely affected. They are, then, sections intended by parties thoroughly conversant with the subject to provide a business-like working agreement which should regulate the future working of minerals in the neighbourhood of statutory undertakings, fairly reconciling the interest of the mineowner to work out his minerals without regard to surface damage and that of the railway company to acquire support for its works and, if minerals have for that purpose to be left unworked, to ensure that that shall be done at as little cost as possible to itself. Before turning to a consideration of the sections upon the construction of which the present issue depends, it may be well to mention that the new code introduces one quite novel feature. Previously, in the absence of any agreement to the contrary, the mineowner was, in respect of any minerals within the prescribed area not covered by a counter-notice, entitled to work them out by proper working without incurring liability for any damage done to the works of the railway company.

(1) [1911] 2 Ch. 97; [1913] A. C. 11.

There was no middle way. Either there was counter-notice, sterilization, compensation, or there was no counter-notice, liberty to work the minerals, no liability for damage. Under the new code, where there is no counter-notice the mineowner may work his minerals in the new area of protection, but, if he does so, he is placed under a liability to contribute towards the expense of making good the damage caused by such working. This new benefit to the railway company and burden upon the mineowner, which arises where the mineowner elects to work his minerals, may be regarded as some set-off against the benefit to the mineowner and the increased burden on the railway company, which arises where the company elects to sterilize the minerals within a wider area of protection than that for which the old code provided.

I turn to the relevant sections, premising once more that, as they have been already stated, I do no more than state their broad effect, except where their precise language is material. Section 78, sub-ss. 1 and 2, make no material difference in the existing law except (and this is an important exception) that the area of protection therein mentioned is by virtue of the definition in s. 78, sub-s. 5, an area very different from that under the old code. It is or may be far more extensive than the old area and when the lateral distance from the area comprising the railway or works of the company exceeds forty yards the area is divided into two parts called an inner and an outer area, the inner area consisting of the area comprising the railway or works and a distance of forty yards therefrom on all or both sides thereof and the outer area consisting of so much of the area of protection as is not included in the inner area. It is this extension of area of protection which increases the burden of compensation imposed upon the railway company. Section 78, sub-s. 4, provides for compensation for both mineowner and royalty owner. The measure of the compensation is "the loss caused by the specified minerals being left unworked." In this measure there is nothing new: the old code had provided "if the company be willing to make compensation for such mines or any part thereof to such owner, lessee or occupier thereof, then he shall not work or get the same," Railways Clauses Consolidation Act, 1845, s. 78. In a series of decisions of high authority, of which it is only necessary to refer to *Eden* v. *North Eastern Ry. Co.* (1), the manner of ascertaining the compensation for not working the minerals was well settled. "The full value of the coal," said Lord Macnaghten (1) citing Lord Penzance in *Smith* v. *Great Western Ry. Co.* (2), "deducting, of course, the cost of getting "it, must be the measure of the compensation." By s. 78A further provision is made in regard to compensation. Some argument revolved around the meaning of the second proviso to s. 78A, sub-s. 1, the railway company urging that for the purpose of the compensation thereby prescribed the value must be ascertained of the minerals in both the inner and the outer areas, whilst the mineowner contended that only the minerals in the inner area must be so valued. Though my opinion inclines to the latter view, I do not think it necessary to decide the question. Its only relevance is that, if the contention of the mineowner is right, yet one more capricious result will follow from an application of the provisions of s. 79A to the case of minerals for which compensation is payable under s. 78A. I do not consider that there is need to seek reinforcement from considerations which rest upon an uncertain premise. On the third proviso also to the same sub-section, which deals with the compensation payable to the royalty owner, some argument was founded, the mineowner urging that the clear language of the proviso does not admit of any deduction in respect of contributions under s. 79A from the compensation payable to the royalty owner, and that it cannot have been contemplated that in the case of the mineowner such a deduction should, and in the case of the royalty owner it should not, be made. I am not satisfied that an answer to this contention may not be found in the language of s. 79A, sub-s. 3, but the question is one which may be of importance as between mineowner and royalty owner, and as it does not immediately arise for decision I prefer to express no opinion on it. Sections 80 and 81 contain some further provisions in favour of the mineowner, but it is substantially in ss. 78 and 78A that there are found the advantages which the new code confers on him. They relate to minerals which are sterilized and, though apart altogether from the proposed introduction of the provisions of s. 79B, it may be impossible to determine with scientific accuracy the loss caused by leaving minerals unworked and the compensation accordingly payable, yet long experience has shown that the elements of doubt arising from uncertainty as to the quantity of ungotten minerals future prices and so on can be fairly and satisfactorily resolved.

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(1) [1907] A. C. 400.

(1) [1907] A. C. 407.

(2) 3 App. Cas. 165, 185.

I turn now to the sections which deal with minerals that are not specified and accordingly may be worked. Section 79 introduces nothing new in the law that is of present importance. It is s. 79A which, for the first time, imposes on the mineowner working unspecified minerals, and working them in a proper manner, the obligation nevertheless to contribute to the expenses of the railway company in making good the damage to its works caused by such working. It is not surprising to find that this new obligation is hedged about with a number of safeguards for the protection of the mineowner. The question is whether this liability to contribute to damage caused by the actual working of unspecified minerals is a factor of which account must be taken in calculating the compensation payable in respect of specified minerals which are left unworked.

My Lords, it is a truism, of which we have often been reminded in the course of this case, that the whole of an instrument should be read in order to ascertain the meaning of any part of it. I do not doubt that the sections constituting the new mining code should be read together as one whole. So reading them and remembering, as I am entitled to do, the pre-existing law and its anomalies, I respectfully concur in the view expressed in different language by the Master of the Rolls and MacKinnon L.J., that in ascertaining the " loss caused by the " specified minerals being left unworked," and in particular " the value " of such minerals, the disputed factor of notional liability ought not to be brought into account, but that the provisions relating on the one hand to compensation and on the other to contribution are separate and distinct, and that the latter ought not to be taken as governing the measure of the former. There is, I think, much weight in the contention that in the absence of express words or necessary implication a radical departure from the old basis of compensation should not be assumed and a new factor, unknown to the old code, brought into account. And it is the more difficult to introduce this new factor when it is appreciated that at common law the surface owner could claim to have support for his land only in its natural state, unless he had acquired also an easement of support for unnatural burdens thereon. On this part of the case I would respectfully concur in the views of my noble and learned friend, Lord Maugham, whose opinion I have had the advantage of reading since I wrote my own judgment. But whatever view I might finally take of the matter, if the new factor proposed to be brought in was fairly capable of definition,

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I am confirmed in my prima facie view as to the correct construction of the section by a more critical examination of the task which the railway company's contention imposes on the arbitrator. For such an examination will reveal that he will be required to build on guesswork and conjecture, and in doing so to deprive the mineowner of the very real safeguards which in the case of actual working the Act provides for him.

How is it possible, my Lords, fairly to apply the provisions of s. 79A to the case of the notional working of minerals which are in fact unworked? It has been urged that some weight should be given to the fact that in the present case the parties did arrive at a figure representing the factor of liability to contribution, if the mineowner was wrong in his contention, and that factor had to be brought into account. To me this appears to have no weight at all. The assumption being made that this factor has to be brought into account, the parties may agree a figure as well by irrational guesswork as by rational estimate. They do so in order to save the expense of an arbitration which may be the more prolonged and expensive just because the elements are incalculable. It may indeed be that your Lordships would have regarded with suspicion as a tactical move in the game a refusal on the part of the mineowner to agree any figure under any circumstances. Then it was contended that after all it was no uncommon thing for an arbitrator to have to take all manner of hypothetical elements into consideration. It is a commonplace that, wherever there is injury and there cannot be restitutio in integrum, the amount of damage, whether assessable by judge, jury or arbitrator, may be no more than an estimate and a capricious one at that. But when the question is one of construction, viz., whether the provisions of s. 79A govern the ascertainment of compensation under s. 78A, it appears to me, with all deference to those who think otherwise, to be a mere petitio principii to say that these are all matters which the arbitrator can take into consideration and that he will do his best. If it appears that the best that he can do cannot be founded on a rational estimate and must disregard essential features in the determination of the quantum of liability, surely the conclusion, if it is open to one, must be that this is not a matter which the arbitrator is required to take into consideration at all. My Lords, it appears to me that the provisions of s. 79A cannot by any means be made applicable to the case of the notional working of unworked minerals. It is not a matter only of difficulty of estimate. For, though it is not possible to define the stage at which difficulty becomes impossibility, or at which rational estimate becomes irrational guesswork, yet here it appears to me plain that an arbitrator is set an impossible task if he is asked to determine fairly and rationally and in accordance with the provisions of s. 79A what is the amount of contribution which the mineowner would have to make if he worked the minerals which he leaves unworked. There may be cases of rare simplicity where he could satisfactorily accomplish his task, but from this fact, if it be a fact, it is not a fair conclusion that it is the intention and effect of the Act that in such cases s. 79A should be brought into account, but that in other cases the arbitrator should despairingly recognize that he had been set a task beyond his calculation. The task which the appellants would impose on the arbitrator is, in my opinion, for many reasons, an impossible one and such as your Lordships should not hold the legislature to have imposed on him. The factors are cumulative. Where there has been actual working, the liability to contribute arises on demand in respect of damage caused by such working. In the case of notional working, the nature of the damage and the date of its occurrence are left to the conjecture of the arbitrator. It is worth noting that this runs counter to the usual policy of the law. It is well settled that no action will lie for anticipated damage which is expected to occur, but which has not actually occurred and may never occur. The surface owner can only claim for damage for subsidence when it has occurred. But in the case supposed the arbitrator must determine when the minerals will be worked, at what stage subsidence will occur, an event that may happen many years after the removal of the minerals, what will be the works then on the land affected, what their condition, what the damage, what the expenses of making good such damage. And at every stage of such inquiry his estimate might be falsified if the mineowner proceeded to an actual working. His estimate could only proceed on a notional working of all the minerals: in practice the mineowner might reduce or eliminate the risk of subsidence or indefinitely postpone it by leaving adequate pillars, by packing the roads or by such other precautions as he thought fit. It is at this stage that it is worth mentioning s. 79B. This section has been described as mere machinery. So it may be. But it is machinery which in practice may provide a most important safeguard for the mineowner. Mandatory in terms, it places on the railway company the obligation of giving to the mineowner precise information as to the railway or works to which damage has been caused or to which damage is apprehended from the working of minerals, the nature of the damage or apprehended damage and the nature of the works intended to be carried out for the purpose of making good or preventing the damage. It cannot, I think, be doubted that this is information of real importance to the mineowner, which will assist him in his plan of working. He will then be able to decide whether he will work all the minerals at the cost of making his contribution, or whether he will work out part only of the minerals in the hope that the apprehension of damage may not be realized. A nice question might well arise whether it would pay him better to work all the minerals and pay his contribution or work part only of the minerals in the hope of avoiding damage and consequent liability.

These are considerations which by themselves would lead me to reject this appeal. But there are yet more cogent reasons why, in my opinion, the arbitrator cannot fairly measure the contribution which the mineowner ought to make in respect of the notional working of specified minerals. It is, I think, a fair assumption that in the compromise to which these sections give effect it was an important element that the mineowner's liability under s. 79A should be limited, and it is significant that this limitation is worked out in the most careful detail. Yet it is plain that this safeguard, so important to the mineowner in actual working, is in any notional working largely illusory. By sub-s. 2 of s. 79A the liability of a mineowner to contribute is limited to an aggregate sum " equivalent to sixpence for " each ton of the commercially workable minerals, gotten or " ungotten, in such part of any seams as lies under the area " ascertained as respects the several seams in accordance with " the rules contained in the second schedule to this Act, being " seams which have been or are being worked under such area " as aforesaid : Provided that, in ascertaining such aggregate " sum as aforesaid, minerals gotten more than six years before " the date on which a contribution shall have been demanded " by the company under this section shall not be reckoned." The rules in the second schedule prescribe an elaborate calculation to which I need not refer. Bearing in mind that liability arises on demand and that demand follows on damage and that damage if any will take place on a date that is unpredictable, I can come to no other conclusion than that it is a sheer impossibility for the arbitrator to apply those provisions to a notional working. Consider the proviso alone. This is vital. Minerals gotten more than six years before the date of demand are not to be reckoned. By what process of reasoning can the arbitrator determine what minerals will have been gotten before an unpredictable date? He cannot do so. I decline then to assume that for the real safeguard of an ascertainable maximum liability the legislature intended in the case of a notional working to substitute what could be at best an inspired guess. In sub-s. 4 of s. 79A I find further support for the view that I have formed. The operation of this sub-section is confined to damage done by workings in a " single mine " as there defined. This may however cover a large number of cases. This sub-section provides a further limitation on the liability of the mineowner " as respects damage done by workings in " any single mine " namely, that when the aggregate of the sums paid by the mineowner in satisfaction of such liability amounts to a sum equivalent to sixpence for each ton of commercially workable minerals to be ascertained in accordance with the precise and elaborate method therein described, then " the mineowner shall not be liable to make any further " contribution under this section towards the expenses of " making good any damage caused to any part of the railway " or works by the working of such seams as aforesaid in that " mine." I need not repeat what I have said as to the sheer impossibility of making the prescribed calculation except ex post facto when the damage has in fact occurred. There is this further point, which is to me by itself almost conclusive. If the railway company is right, the arbitrator in (say) the year 1944, being called on to ascertain compensation payable in respect of specified minerals left unworked in a single mine and being required to take into account the element of hypothetical contribution, makes his answer accordingly. He is not required to state what sum he has allowed by way of deduction under this head: sub-s. 1 (iv.) of s. 78A, which does require him to state the tonnage of the specified minerals on which his award is based, provides a contrast on this point. At a later date, it may be at a much later date, damage is done to some part of the railway or works of the company by the working of " such " seams as aforesaid in that mine." It appears to me inevitable that the mineowner should be deprived of his safeguard of limited liability. For he cannot tell and no one can tell, unless it be the arbitrator, who may be dead or may have forgotten, what sum he has already contributed towards his maximum liability. Yet another aspect of this matter confirms my view. Just as past contributions in respect of notional workings ought to be taken into account in determining the contribution to be paid in respect of actual damage, so in determining the contribution to be deducted in the ascertainment of compensation the arbitrator should credit towards the maximum liability any contribution which may have already been made. He is ex hypothesi looking forward to a time when damage would have been caused by the working of the unworked minerals. It is no unreasonable assumption that before this time damage may have been caused by other working and a contribution made for which the mineowner is entitled to credit. Yet such an amount appears to me a matter not of rational estimate but of mere conjecture. In this respect as in others the construction, for which the railway company contends, imposes an impossible task on the arbitrator.

For these reasons I think that if the alternative construction is open, by which the element of possible contribution is excluded from the assessment of compensation under s. 78A, that construction should be adopted. As I have stated earlier in this opinion, such a construction can in my view fairly be put on the language of s. 78A. I am therefore of opinion that the first question in the originating summons should be answered in the negative and that this appeal should be dismissed.

Appeal allowed.

Solicitor for appellants: *W. H. Hanscombe.*

Solicitors for respondents: *Gregory, Rowcliffe & Co., for H. E. Allen.*

[HOUSE OF LORDS.]

H. L. (E.)*
1944
Dec. 4.
1945
Feb. 9.

COLFAR . . . . APPELLANT;

AND

COGGINS & GRIFFITH (LIVERPOOL), LIMITED . . . . . . RESPONDENTS.

Master and servant—Injury to servant—Acts of fellow servants—Common employment—Duty to provide safe system of work.

A dock labourer working in the hold of a ship stowing bags of salt, which were being lifted from a barge alongside by two derricks

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* *Present:* Viscount Simon L.C., Lord Thankerton, Lord Macmillan, Lord Porter and Lord Simonds.

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working in " married gear," a system involving the fixing of one derrick arm in an outward position by means of a guy-rope, was injured when several bags of salt fell from a sling into the hold in consequence of the derrick arm, which was not properly secured, having swung inboard, failure to secure it properly being attributable to a fellow-servant :—

Held, that the accident was due to the isolated act of the fellow-servant and not to any failure of the employers to maintain a proper system of working and that accordingly the doctrine of common employment applied.

Speed v. *Thomas Swift & Co., Ld.* [1943] K. B. 557 approved but the employer's liability arising from the duty to provide a safe system of working cannot be further extended.

Decision of the Court of Appeal affirmed.

APPEAL from the Court of Appeal.

The facts, stated by VISCOUNT SIMON L.C., were as follows :, The appellant was an experienced dock labourer who, on March 9, 1942, was one of a number of working stevedores employed by the respondents in the process of lifting bags of salt from a barge and stowing them in No. 4 hold of the steamship *Empire Hope*, which was lying in the Sandon Basin of Liverpool Docks. The bags, each of which weighed about one hundredweight, were being transferred from the barge, which was lying alongside the ship, by means of two derricks working on the ship in what was called " married gear." This method was commonly employed in such operations, and it was not disputed that it normally provided a safe and proper system of work. The method involved fixing one derrick-arm (in this case the starboard one) by means of a guy-rope in an outward position so that it could not swing inboard, and joining the falls of the starboard and port winches so that when a sling containing a load of bags had been raised vertically from the barge, by means of the starboard winch, to a sufficient height, it might, by using both winches together, be moved laterally to hang over the open hatchway and might then be let down till it reached what was called the " stool " at the bottom of the hold. Thereupon the sling was opened and each man working in the hold took a bag on his back and carried it to the proper position for stowage, until the " stool " was cleared ready to receive the next sling. The appellant was one of those so working in the hold. All went well until, just before the work was finished, the dock authority notified that the barge would have to be moved from alongside to allow for the passage of an arriving ship into the dock. The respondents' foreman requested the dock authority to allow a further ten minutes in order to complete the unloading of the barge before moving it, and, on this being granted, the remaining bags of salt, of which there were only five or six sling-loads left in the barge, were lifted in slings which, instead of being transferred directly into the ship's hold, were, to save time, put down on the deck of the ship with a view to the lowering of them into the hold taking place later on. The emptied barge was then removed and, in order to make a clear passage for the incoming ship, the starboard derrick arm was brought inboard. This involved releasing the guy-rope, which, however, should have been again securely fastened in order to fix the derrick arm in its new position. Either the resecuring of the rope never took place, or someone released it after it had been secured. The result of this negligence was that when the use of the derrick was resumed, its arm swung further inboard, dragging one of the loaded slings with it and banging it against the hatch-coamings, so that five or six bags of salt fell out of the sling down the open hatchway and one of them struck the appellant in the hold below and seriously injured him. The appellant brought an action against the respondents for damages for personal injuries, the statement of claim alleging that " one or more bags of salt fell out of the sling " on the plaintiff owing to the negligence of the defendants." The particulars alleged that " the defendants were guilty of " negligence in that they failed to provide and maintain " a proper system of work and/or supervision in that they " rushed the said process of loading and/or overloaded the said " sling and/or failed to sling each sling separately into the said " hatch and/or lowered or put over the said hatch the said " sling before the sling which had been previously landed on " the stool in the said hatch had been cleared and/or failed to " take precautions to prevent the said sling fouling the coamings " of the said hatch and/or to warn the plaintiff and/or caused " or permitted the yard arm of the derrick to swing inboard " without giving the necessary warnings and/or the married " gear to be thrown out of adjustment and/or failed to shift " the barge alongside the said ship to enable an incoming ship " to pass in safety and/or failed to take any or any sufficient " precaution for the safety of the plaintiff and/or caused or " permitted the said bag or bags to slip out of the said sling " and to fall on to the plaintiff." The individual who either failed to fasten or unfastened the guy-rope was not identified,

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but Stable J., who dismissed the action, drew the conclusion that he must have been in common employment with the appellant.

The Court of Appeal (Scott, Luxmoore and Goddard L.JJ.) having affirmed this decision, the appellant appealed to the House of Lords.

M. Turner-Samuels and *Pappworth* for the appellant. The respondents committed a breach of duty to the appellant in failing to take reasonable precautions for his safety, exposing him to unnecessary risk and failing to exercise any effective supervision or to supply adequate plant for the work. If it can be shown that the overloading of the slings was a primary and continuing factor in the accident that entitles the appellant to succeed. That goes directly to the question of system of work. The system was the use of an apparatus to transport the bags from the barge to the hold by means (inter alia) of slings. The proper system was to lift a sling loaded with not more than X bags—whatever was a safe load—and it involved so controlling the work that not more than that number could be put in the sling. That was a duty resting on the respondents, and if the system of the use of slings had limitations, it was their duty to see that the limit was not exceeded. In this case someone put more than X bags into the last few slings. The respondents cannot escape liability because they were obliged so to control work that not more than X bags could be loaded. They should not have left it to the discretion of the men to exceed the load. The law is properly laid down in *Speed* v. *Thomas Swift & Co., Ld.* (1) and *Smith, Hogg & Co., Ld.* v. *Black Sea and Baltic General Insurance Co., Ld.* (2). Further, the respondents contravened the Factories Act, 1937, s. 23, and the Dock Regulations, 1934, regs. 24 and 33, in that they paid no regard to the provisions as to safe working loads.

Pappworth following. The cases of system of work go back to *Smith* v. *Charles Baker & Sons* (3). The duty on an employer to maintain a proper system of work and to provide proper supervision was laid down in *Wilsons and Clyde Coal Co., Ld.* v. *English* (4). The object of such a system is to protect the men against themselves: see also *Speed* v. *Thomas Swift & Co., Ld.* (1) and *Porter* v. *Port of Liverpool Stevedoring Co., Ld.* (5).

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(1) [1943] K. B. 557.
(2) [1940] A. C. 997, 1003.
(3) [1891] A. C. 325.
(4) [1938] A. C. 57.
(5) [1944] 2 All E. R. 411.

Clothier K.C. and *S. Scholefield Allen* for the respondents were not called on to argue.

The House took time for consideration.

Feb. 9, 1945. VISCOUNT SIMON L.C. My Lords, the individual who, in breach of his duty, either failed to fasten or negligently unfastened the guy-rope was not identified, but the learned judge was abundantly justified in drawing the conclusion that he must have been a fellow-workman of the appellant and in "common employment" with him within the meaning of that expression when it provides the employer with a defence, notwithstanding his employee's negligence. Some of the limitations of this defence have recently been explained by this House in *Wilsons and Clyde Coal Co., Ld.* v. *English* (1), and in *Radcliffe* v. *Ribble Motor Services, Ld.* (2), but if the accident in the present case is due to faulty treatment of the guy-rope it is an obvious example of injury to a workman by the casual act of carelessness of a fellow-employee when both are engaged in a common service. According to a doctrine which has been established in our law for more than a hundred years, and which nothing short of an Act of Parliament can alter, the sufferer in such a case must be regarded as having entered into a contract with his employer that he will not hold him liable for the other workman's fault. This defence of common employment, however, in cases where the work involves, or ought to involve, a proper system of work in order to minimize danger, does not avail to prevent the application of the rule, that if the injury to the workman is caused by the employer failing to take reasonable care to establish and maintain such a system he is liable to his injured workman. And this liability of an employer for failure to take reasonable care to establish and maintain a proper system of work continues to attach to the employer whether or not he has delegated the establishment and maintenance of such a system to a subordinate. This proposition is affirmed in many cases decided in this House. Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (3), after expounding the doctrine of common employment, said that "when a master employs "his servant in a work of danger he is bound to exercise due

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(1) [1938] A. C. 57.

(2) [1939] A. C. 215.

(3) (1858) 3 Macq. H. L. 266, 288.

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"care in order to have his tackle and machinery in a safe "and proper condition, so as to protect the servant against "unnecessary risks." I doubt whether the limitation of the rule to employment "in a work of danger" is necessary; work may be safe if the system is good, but become dangerous if the system is faulty. Lord Cranworth cited (1) *Sword* v. *Cameron* (2); Lord Chelmsford L.C. expressed the same view in *Bartonshill Coal Co.* v. *McGuire* (3); and Lord Wensleydale in *Weems* v. *Mathieson* (4) indicated that an employer is responsible not only for want of care in providing good and sufficient apparatus, but also for his failure to see that the apparatus is properly used. All the cases to which I have referred came from Scotland, but the proposition is part of the law of England also. Indeed, so far as the employer's liability for negligence "by reason of any defect in the "condition of the ways, works, machinery or plant" is concerned, this is now expressly stated in the Employers' Liability Act, 1880, s. 1; but the common law liability extends to a failure to provide and maintain "a proper system of "work" even though the case is not covered by the statute. The whole matter is expounded by Lord Watson in a passage of the well-known decision of *Smith* v. *Charles Baker & Sons* (5), and is most clearly explained in the recent case of *Wilsons and Clyde Coal Co., Ld.* v. *English* (6) in this House. The Court of Appeal has recently had occasion in *Speed* v. *Thomas Swift & Co., Ld.* (7) to consider the meaning and application of the employer's "duty to provide a safe system of "working"—as it happens, in connexion with the working of "married gear"—and the judgments of Lord Greene M.R., and his colleagues appear to me to carry the analysis of "system of working" to the furthest point that can be reached. I agree with the propositions there laid down, but, as long as the doctrine of common employment continues to apply, do not think that the employer's liability at common law arising from this duty can be further extended.

Such being the state of the law, the advisers of the present appellant realized that his claim (independently of the Workmen's Compensation Act) was bound to fail unless it could be established that the accident was due to the respondents' failure to provide and maintain a proper system of work. To raise this issue, the statement of claim ought to set out, so far as relevant, what the proper system of work was, and in what relevant respects it is alleged that it was not observed. Instead of this, there is merely an allegation that the bag of salt " fell out of the sling on the plaintiff owing to " the negligence of the defendants," followed by particulars many of which cannot be regarded as alleging defects of " system " at all. However, Mr. Turner-Samuels made it plain to us that what he relied on was the alleged overloading of the last few slings by the picking up of too many bags at the same time. I do not think that the evidence established that this took place, or that it was due to negligence. Still less was it proved to be due to disregard of a safe system of working. The sling was in no danger of breaking under its load. The limit to the number of bags taken at a time was primarily aimed at securing that the men in the hold should not be set too heavy a task in dealing with the contents of a single sling before the next one arrived. The effective cause of the accident was the casual act of negligence committed by some unidentified fellow-workman in reference to the guy-rope. There is no finding by the learned judge that it was negligent to put so many bags in one sling and I agree with the Court of Appeal that it would be wrong to draw this conclusion on the evidence. The right view is that the cause of the appellant's injury was not what Lord Justice-Clerk Aitchison in the Court of Session, in *Wilsons and Clyde Coal Co., Ld.* v. *English* (1), called " the practice and method adopted in " carrying on the master's business of which the master is " presumed to be aware and the insufficiency of which he can " guard against " but must be classed amongst those " isolated " or day-to-day acts of the servant of which the master is not " presumed to be aware and which he cannot guard against." The appeal therefore fails, but the appellant is not thereby deprived of his claim under the Workmen's Compensation Acts. I am able to add, my Lords, that my noble and learned friend, Lord Macmillan, concurs in the opinion which has been delivered.

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(1) (1858) 3 Macq. H. L. 289.

(2) (1839) 1 D. 493.

(3) (1858) 3 Macq. H. L. 300, 310.

(4) (1861) 4 Macq. H. L. 215, 226.

(5) [1891] A. C. 325, 353.

(6) [1938] A. C. 52.

(7) [1943] K. B. 557.

LORD THANKERTON. My Lords, I am of the same opinion.

(1) 1936 S. C. 883, 904.

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LORD SIMONDS. My Lords, I concur. My noble and learned friend, Lord Porter, has asked me to say that he concurs also.

Appeal dismissed.

Solicitors for appellant: *J. H. Milner & Son, for Silverman & Livermore, Liverpool.*

Solicitors for respondents: *P. F. Walker, for Weightman, Pedder & Co., Liverpool.*

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Apr. 16.

[PRIVY COUNCIL.]

CANADIAN NATIONAL RAILWAYS AND OTHERS . . . . . . APPELLANTS;

AND

CANADA STEAMSHIP LINES, LIMITED AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Carriage of goods—Agreed charges—Approval by Board of Transport Commissioners—Relevant considerations—Effect on business or revenues of other carriers—The Transport Act, 1938 (2 *Geo.* 6, *c.* 53), *s.* 3, *sub-s.* 2; *ss.* 35, 36.

On an application to the Board of Transport Commissioners under s. 35 of The Transport Act, 1938, for the approval of a charge agreed between a shipper and competing carriers by rail, the Board is not precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business or revenues of other carriers concerned in the traffic affected.

The circumstance that the general words in sub-s. 13 of s. 35, "on any application under this section, the Board shall have "regard to all considerations which appear to it to be relevant," are followed by a specific direction to the Board to have regard in particular to two specified matters, in no way derogates from the generality of their discretion, and the mention of the two particular topics as matters to be considered does not justify any inference that consideration of the revenue or business of an objecting carrrier is excluded.

Dictum of Lord Cave L.C. in *Ambatielos* v. *Anton Jurgens Margarine Works* [1923] A. C. 175, at p. 183, referred to.

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* *Present:* VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ROCHE and LORD SIMONDS.

The provision in s. 3, sub-s. 2, of The Transport Act, that "it "shall be the duty of the Board to perform the functions vested "in the Board by this Act and by the Railway Act with the object "of co-ordinating and harmonizing the operations of all carriers "engaged in transport . . . ." applies to all the Board's functions, including that of approving agreed charges.

Judgment of the Supreme Court of Canada [1943] S. C. R. (Can.) 333, affirmed.

APPEAL (No. 18 of 1944), by special leave, from a judgment and order of the Supreme Court of Canada (May 4, 1943), which by a majority answered in the negative a question of law submitted for its opinion by the Board of Transport Commissioners for Canada.

This appeal arose out of an application made to the Board of Transport Commissioners by the appellants, certain Canadian railways, under s. 35 of The Transport Act, 1938, for the approval by the board of charges agreed between the railways and certain shippers (traders). The application was opposed by the respondents, steamship companies operating on the Lakes, on the ground, mainly, that the agreed charges, if sanctioned, would have the effect of depriving them of the whole or a large part of their share of the traffic, and would prejudicially affect their business and revenues. The railways contended that the board was precluded from considering an objection made on that ground. The board refused to approve the agreed charges, and the railways having applied to the board for a review and rehearing, the board stated a case for the opinion of the Supreme Court on the following question of law: "On an application to the board under s. 35 of The Transport "Act, 1938, for the approval of an agreed charge between a "shipper and competing carriers by rail, is the board precluded "from regarding as relevant considerations the effects which "the making of the agreed charge is likely to have on the "business or revenues of other carriers ?"

By s. 35, sub-s. 13: "On any application under this section, "the Board shall have regard to all considerations which "appear to it to be relevant and, in particular, to the effect "which the making of the agreed charge or the fixing of a "charge is likely to have, or has had, on—(*a*) the net revenue "of the carrier; and (*b*) the business of any shipper by whom, "or in whose interests, objection is made to approval being "given to an agreed charge, or application is made for approval "to be withdrawn."

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The Supreme Court (Davis, Kerwin and Hudson JJ., Duff C.J. and Rinfret J. dissenting) answered the question submitted in the negative.

1945. Mar. 7, 8. *Pritt K.C.* and *B. MacKenna* for the appellants. The question, which turns primarily on the construction of the Transport Act, 1938, is whether the Board of Transport Commissioners, in deciding whether to approve certain agreed charges, is to consider the adverse effect of the operation of those charges on somebody who, at first sight, appears to have nothing to do with the matter, namely, carriers of another kind who may get some of the traffic if the agreed charges are not approved. In substance, the question is whether they have the right to have their interests considered by way of intervention. It is contended that the respondents' argument—that their revenue will be effected—cannot be considered at all by the Board of Transport Commissioners. The two vital sections of the Transport Act are s. 35 and s. 36, and the whole of the argument for the appellants is really based on the latter section (1) read with s. 35. Parliament has made special provision in s. 36 for the investigation of complaints that agreed charges adversely affect the business of competing carriers, and it is not competent for the Board of Transport to hold an investigation of such complaints except in the circumstances and under the conditions prescribed by s. 36, and, in particular, the duty imposed on the board by s. 35, sub-s. 13, to have regard to all considerations which appear to it to be relevant, cannot be read so widely as to empower the board by implication to hold such an investigation otherwise than under the provisions and conditions of s. 36.

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(1) By s. 36, sub-s. 1, of the Transport Act, 1938: "Upon "complaint to the Minister by any "representative body of carriers "which, in the opinion of the "Minister, is properly representa-"tive of the interests of persons "engaged in the kind of business "(transport by water, rail or air, "as the case may be) repre-"sented by such body that any "existing agreed charge places "such kind of business at an "undue or unfair disadvantage, "the Minister may, if satisfied that "in the national interest the "complaint should be investi-"gated, refer such complaint to "the Board for investigation, and "if the Board after hearing finds "that the effect of such agreed "charge upon such kind of "business is undesirable in the "national interest, the Board "may make an order varying or "cancelling the agreed charge "complained of or may make such "other order as in the circum-"stances it deems proper."

If Parliament had intended that an agreed charge should not be approved if it would, or might, prejudicially affect the business of any competing carrier, it is reasonable to suppose that Parliament would either have expressly provided in s. 35 that the board should not so approve or would have provided in some other way in that section for the protection of the interests of competing carriers. No provision is made in s. 35 directing the board to have regard to the effect which the making of the agreed charge is likely to have, or has had, on the net revenue of a person who is not *the carrier* but another, a competing carrier. The only authority which, even by analogy, has any bearing on the matter is *Great Western Ry. Co.* v. *Chamber of Shipping of the United Kingdom* (1), but in the end the matter comes back to the question of construction. It should not lightly be said that carriers may be opposed by consideration of the profit and advantage of other persons, unless there is something positive in the section authorizing their consideration. There is nothing in ss. 35 and 36 which expressly, or even indirectly, gives the power to consider the interests of rival carriers. On the true construction of those sections the board, on an application for the approval of an agreed charge between a shipper and competing rail carriers, is precluded from regarding as relevant considerations the effects which the making of an agreed charge is likely to have on the business and revenues of other carriers.

B. MacKenna followed. When s. 36 contains elaborate provision for dealing with the kind of complaint therein referred to, it is a reasonable inference that the legislature did not intend that that kind of complaint should be investigated without regard to those restrictions. Those restrictions are thus imposed on the scope and activities of the board under sub-s. 13 of s. 35. *Great Western Ry. Co.* v. *Chamber of Shipping of the United Kingdom* (1) is closely analogous to this case, but here the appellants submit that the Board of Transport Commissioners are not merely not bound to consider the effect on other carriers, but have no power to take that into account.

Sir Walter Monckton K.C. and *Gahan* for the respondents. Sub-section 13 of s. 35 expressly empowers and directs the board to have regard to all considerations which appear to the board to be relevant, and they are thereby empowered to determine what considerations are or are not relevant, subject

(1) [1937] 2 K. B. 30.

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to the direction that they must not overlook the two features (*a*) and (*b*) in sub-s. 13. The effects which the making of an agreed charge is likely to have on the business and revenues of other carriers as defined in the Act are in fact relevant considerations on the question of approval of such agreed charge, particularly having regard to the express injunction of sub-s. 2 of s. 3 of the Act (1). The duty imposed by s. 3, sub-s. 2, is one in respect of all the board's functions, including those which it has to perform under s. 35—the approving of agreed charges. Under sub-ss. 1 and 13 of s. 35 the board is given an absolute discretion in the matter of approving or not approving agreed charges, and having regard to the effect which the making of an approved charge is likely to have on other regulated carriers is a proper exercise of that discretion. Where Parliament, in conferring the power of approval or disapproval, has seen fit to lay down two specific cases in which such approval may not be granted, the obvious implication would be that the board's discretion is to be unfettered in all other cases. Sub-section 13 of s. 35 confers the discretion in the widest possible language, by which the board is directed not only to have regard to all relevant considerations, but is also given power to decide what is and what is not relevant. Sub-section 5 of s. 35 makes express provision for opposition to the approval of agreed charges by individual carriers, and if the question referred to the Supreme Court is answered in the affirmative the right of opposition thus given would be nullified. Section 36 cannot help in interpreting s. 35; it deals with a different matter.

Pritt K.C. replied.

Apr. 16. The judgment of their Lordships was delivered by LORD MACMILLAN. This appeal arises from an application presented to the Board of Transport Commissioners for Canada by the Canadian National Railways, the Canadian Pacific Railway Company and other Canadian Railways, under s. 35

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(1) By s. 3, sub-s. 2, of the Transport Act: "It shall be the "duty of the Board to perform "the functions vested in the "Board by this Act and by the "Railway Act with the object of "co-ordinating and harmonizing "the operations of all carriers "engaged in transport by railways, "ships and aircraft and the "Board shall give to this Act and "to the Railway Act such fair "interpretation as will best attain "the object aforesaid."

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of The Transport Act, 1938, for the approval by the board of charges agreed between the railways and certain shippers—or "traders" as they would be termed in English railway parlance. The agreed charges were for the carriage by rail in carloads between eastward and westward points in Canada of specified goods which up to that time had been carried for a portion of the route by water transportation on the Great Lakes. In two of the cases the agreed charges affected 85 per cent. and 95 per cent. respectively of the traffic, and in the two other cases 100 per cent.

The application was opposed by steamship companies operating on the Lakes on the ground, mainly, that the agreed charges, if sanctioned, would have the effect of depriving them of the whole or a large part of their share of the traffic, and would prejudicially affect their business and revenues. On behalf of the railways it was contended that the board was precluded from considering an objection by the steamship companies on this ground. The board refused to approve the agreed charges, Deputy Chief Commissioner Garceau dissenting. The opinion of the majority is thus expressed by Chief Commissioner Cross :—" I think, therefore, that the effect the agreements " will have on the objecting carriers' business and revenues is a " relevant consideration and that approval and the putting " into effect of the said agreed charge agreements would likely " be unduly prejudicial to the objecting water-carriers who have " participated in the carriage of the traffic and place them and " their business at an undue or unfair disadvantage."

An application having been made to the board on behalf of the railways for a review and rehearing, the board, in pursuance of the power conferred on it by s. 43 of the Railway Act (R. S. C. 1927, c. 170) and s. 4 of the Transport Act, stated a case for the opinion of the Supreme Court of Canada on the following question of law :—" On an application to the board under s. 35 " of the Transport Act, 1938, for the approval of an agreed " charge between a shipper and competing carriers by rail, is the " board precluded from regarding as relevant considerations the " effects which the making of the agreed charge is likely to have " on the business or revenues of other carriers ? "

The Supreme Court by a majority (Davis, Kerwin and Hudson JJ.) answered the question in the negative, Duff C.J. and Rinfret J. dissenting. Special leave having been granted to the railways to appeal to His Majesty in Council, their Lordships have now in turn to consider the question.

The legislation on the subject of agreed charges is contained in Part V. of The Transport Act, which for the first time sanctioned the making of such charges. Part V. consists of five sections, of which only ss. 35 and 36 need be considered. Section 35, sub-s. 1, empowers a carrier to make such charges for the transport of the goods of any shipper as may be agreed between the carrier and that shipper, provided that the agreed charges are approved by the board. By s. 2 of the Act " carrier " means any person engaged in the transport of goods or passengers for hire or reward to whom the Act applies; " shipper " means a person sending or receiving or desiring to send or receive goods by means of any carrier to whom the Act applies; and " transport " means the transport of goods or passengers whether by air, by water or by rail, for hire or reward to which the provisions of the Act apply. In two cases the board is directed not to approve of an agreed charge, namely (1.) if in its opinion the object of the agreed charge can, having regard to all the circumstances, adequately be secured by means of a special or competitive tariff of tolls under the Railway Act or the Transport Act; and (2.) when the transport is by rail from or to a competitive point or between competitive points on the lines of two or more carriers by rail, unless the competing carriers by rail join in making the agreed charge.

Sub-section 5 of s. 35 confers on inter alios " any carrier " the right to object and to be heard in opposition to an application for the approval of an agreed charge. Sub-section 9 authorizes inter alios " any carrier " to apply after a year for the withdrawal by the board of its approval to an agreed charge. Sub-section 13, on the interpretation of which the question at issue turns, must be quoted in full. [His Lordship read the sub-section and continued:] " The carrier " here mentioned is the carrier with whom the charge has been agreed. It will be observed that sub-s. 13 applies to any application under s. 35, and is therefore applicable not only to the initial sanctioning of an agreed charge under sub-s. 5, but also to a subsequent application under sub-s. 9 for the withdrawal of the board's approval. The agreed charges may have been agreed between a shipper and any carrier whether by air, water or rail. An affirmative answer to the question propounded would thus preclude the present appellants from objecting to the approval of a charge agreed between a shipper and the respondent shipping companies for the carriage of goods by water on the ground of the effects which the making of the agreed charge would be likely to have on the business or revenues of the railways.

It would be difficult to conceive a wider discretion than is conferred on the board as to the considerations to which it is to have regard in disposing of an application for the approval of an agreed charge. It is to have regard to "all considerations "which appear to it to be relevant." Not only is it not precluded negatively from having regard to any considerations, but it is enjoined positively to have regard to every consideration which in its opinion is relevant. So long as that discretion is exercised in good faith the decision of the board as to what considerations are relevant would appear to be unchallengeable. The circumstance that the general words are followed by a specific direction to the board to have regard in particular to two specified topics in no way derogates from the generality of their discretion. It is not a case to which the ejusdem generis rule applies, for the general words do not follow on an enumeration of particular instances but precede the particular instances. "I know of no authority," said Lord Cave L.C., "for applying that rule to . . . . a case where, to begin "with, the whole clause is governed by the initial general "words": *Ambatielos* v. *Anton Jurgens Margarine Works* (1). Nor is the maxim expressio unius est exclusio alterius applicable to such a case as the present. In their Lordships' view the mention of the particular matters of (*a*) the net revenue of the carrier who has agreed the charge, and (*b*) the business of the objecting shipper, as matters to be considered, does not justify any inference that consideration of the revenue or business of an objecting carrier is excluded.

If the objecting carrier in resisting the approval of a charge agreed between a rival carrier and a shipper were to be precluded from referring to its probable effect on his own business it is not easy to see on what other grounds of objection he could rely. According to Rinfret J., one of the two learned judges in the minority in the Supreme Court (2), "the right of 'any "'carrier' to be heard in opposition to an application for the "approval of an agreed charge, which is given by sub-s. 5, "must be limited to the consideration of one of the two circum"stances included in the proviso of sub-s. 1 of s. 35," being one of the two cases in which the board is directed not to approve of an agreed charge. With all respect, their Lordships find themselves unable to agree with this view. The proviso in sub-s. 1

(1) [1923] A. C. 175, 183.   (2) [1943] S. C. R. (Can.) 342.

excepts two cases from the power of the board to approve agreed charges, and to that extent limits its jurisdiction. To hold the objecting carrier restricted to objections based on that proviso would be to limit his challenge to questions of the board's competency, and would preclude him altogether from advancing any objections on the merits. It is only in the case of an application which the board can competently entertain and grant, that is, one not excluded by the proviso in sub-s. 1, that the board is to have regard to all considerations which appear to it to be relevant. In giving to " any carrier " the right to be heard in opposition to any agreed charge the Act means that he shall be heard in opposition to any agreed charge which the board may competently approve. Permissible opposition is not confined to the competency of the board to approve a particular agreed charge, but includes all considerations on the merits which to the board appear relevant. Moreover, sub-s. 13 applies not only to applications for approval of an agreed charge under sub-s. 5, but also to applications under sub-s. 9 for the withdrawal of the approval given by the board to an agreed charge, that is to say, to an agreed charge of which it must have had jurisdiction to approve in the first instance. It is thus plain that the considerations to which the board may, at the instance of " any carrier," have regard in disposing of an application for the withdrawal of their previous approval of an agreed charge cannot be confined to objections based on the proviso in sub-s. 1. There can be no reason for holding that a carrier should have a more limited scope in objecting to the initial approval of an agreed charge than he has in applying for the withdrawal of the approval previously given to an agreed charge.

The learned Chief Justice gives quite a different reason for answering the question in the affirmative. He refers to s. 36, which reads as follows. [His Lordship read the section and continued :] This section, in the opinion of the Chief Justice, " points unmistakably to the conclusion that the statute does " not contemplate the rejection of an application for the " approval of an agreed charge on the ground that the establish- " ment of such a charge will prejudicially affect the business and " revenues of competing carriers. The proper inference, I " think, from that section is that the effect of the agreed charge " upon competing carriers is not a relevant consideration " within the meaning of s. 35, sub-s. 13 " (1). By this the Chief

(1) [1943] S. C. R. (Can.) 336.

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Justice must be taken to mean that the board are not entitled to treat it as a relevant consideration. Rinfret J., while agreeing with the Chief Justice that the question propounded should be answered in the affirmative, disagrees with him as to the bearing of s. 36 on the question. He regards the section, and in their Lordships' opinion rightly regards it, as dealing " with " an entirely different matter." Section 36 can be invoked only by a representative body of carriers ; a complaint under it is addressed to the Minister, not to the board ; it involves consideration of the national interest and of kinds of businesses ; it assumes that a charge has been competently agreed and approved and is in existence and operation. Section 35 is concerned with quite different topics arising at a different stage. An individual carrier may have interests distinct from, and possibly even opposed to, the national interest. He cannot at his own hand invoke s. 36 ; it is to his rights under s. 35 that he must look for his protection.

There are wider considerations which lend support to the view which has commended itself to the majority of the learned judges of the Supreme Court and which commends itself to their Lordships. The Act of 1938 introduces important extensions and innovations in the transport law of Canada. It provides for the first time for the control of rates for transport by water and transport by air, as well as providing for the first time for agreed charges. The extension of the board's jurisdiction is not only signalized by the change in its name, but is accompanied by a special injunction addressed to it by Parliament as to the administration of its enlarged functions. Section 3, sub-s. 2, of the Act thus exhorts the board—" It shall be the duty of the " Board to perform the functions vested in the Board by this " Act and by the Railway Act with the object of co-ordinating " and harmonizing the operations of all carriers engaged in " transport by railways, ships and aircraft and the Board " shall give to this Act and to the Railway Act such fair " interpretation as will best attain the object aforesaid." It would be strange if, in attempting to co-ordinate and harmonize the operations of all carriers by rail, water and air, the board were to be precluded, when performing their new and important duty of scrutinizing agreed charges, from considering their effect on the businesses of all carriers concerned in the traffic affected. Rinfret J. draws attention to the opening words of s. 35—" notwithstanding anything in the " Railway Act, or in this Act "—and apparently takes the

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view that these words absolve the board when dealing with agreed charges from the duty enjoined by s. 3, sub-s. 2, of co-ordinating and harmonizing the operations of all carriers by rail, water and air. This is a misapprehension. The exhortation in s. 3, sub-s. 2, applies to all the board's functions, including that of approving agreed charges. The opening words of s. 35, sub-s. 1, are intended only to indicate that agreed charges may be sanctioned notwithstanding the general provisions as to the universality of charges.

Reference was incidentally made to *Great Western Ry. Co.* v. *Chamber of Shipping of the United Kingdom* (1). In the Supreme Court judgments it is mentioned only in the judgment of Kerwin J., concurred in by Hudson J., and there only to observe that it is of no assistance in the present case. Their Lordships agree. That case arose on an imperial statute confined in its operation to railways, and turned on different language and different considerations from those with which the present case is concerned.

Their Lordships will humbly advise His Majesty that the appeal be dismissed and the judgment of the Supreme Court be affirmed. The appellants will pay the respondents' costs of the appeal.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

(1) [1937] 2 K. B. 30.

J. C.*
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Apr. 18.

[PRIVY COUNCIL.]

SHAFIQA BINT JAMAL EDDIN DASUKI APPELLANT;
AND
SADR EDDIN ET-TIBI AND ANOTHER . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Admissions—Binding validity—Opposite party's decisive oath that admission was true—Mejelle (Tyser's translation), arts. 79, 1588, 1589*—Evidence Ordinance,* 1924, *s.* 14.

A power of attorney, executed by the appellant and her sister before the notary public, and appointing three persons as their attorneys to effect the transfer to the first respondent of certain land owned by the appellant and her sister jointly, contained an admission in the following terms: "We received the whole price "in cash and in advance from the hands of the said purchaser at "the time of signing this power of attorney." The appellant, alleging that she and her sister had only received a small part of the purchase money and that, in effect, a fraud had been perpetrated on them, claimed her share of the balance of the purchase price from the first respondent. Both courts below held that the appellant had failed to establish fraud, but while the trial court held on the evidence that only the amount as alleged by the appellant had been paid to her and her sister, and gave judgment for the balance claimed, the Supreme Court, on appeal, held that the appellant having failed to prove fraud, was bound by her admission, and that the trial court was wrong in allowing evidence to be given on the question whether the amount had been paid:—

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* *Present:* LORD WRIGHT, SIR MADHAVAN NAIR and SIR JOHN BEAUMONT.

Held, that the express enactments of the Mejelle as to admissions are not over-ridden by the general provision in s. 14 of the Evidence Ordinance, 1924, that "in a civil case either party may give "evidence on his own behalf or be summoned to give evidence "for the other party," and that in the circumstances the case should be remitted to the trial court with directions to allow the appellant an opportunity of requiring the first respondent to take the special form of oath under art. 1589 of the Mejelle that the admission made by the appellant and her sister, that they had received the whole price in advance from the purchaser at the time of signing the power of attorney, was not false. If that oath was taken no evidence to prove the admission false would be admissible, and the suit would fail. If it was not taken, the court would be free to act on the view which it formed on the evidence and judgment would go against the first respondent.

Khadijeh Ismail Abu Khadra v. *Amneh Khalil Abu Khadra* (1920–33) P.L R. 1, where it was held that an admission made in an official document did not come within the meaning of art. 1589 of the Mejelle, held wrongly decided.

Apostolic Throne of St. Jacob v. *Saba Said* (1939) 6 P. L. R. 528, at 534, referred to.

APPEAL (No. 37 of 1943) from a judgment of the Supreme Court of Palestine, sitting as a court of appeal (1) (December 8, 1941), which reversed a judgment of the District Court of Nablus (July 27, 1941).

The following facts are taken from the judgment of the Judicial Committee. The appellant, as plaintiff in the suit, claimed from defendant No. 1 and defendant No. 2 (the first and second respondents) the sum of £P. 650. Her case was that she and her sister Aisha agreed to sell their shares in certain lands to respondent No. 1 through their uncle, respondent No. 2, who was acting as an intermediary, for the sum of £P. 1,350; that the sisters only received £P. 50, leaving a balance of £P. 650 due to each sister. The objection that the sister of the appellant was a necessary party to the suit was abandoned at the trial. The appellant and her sister had executed before the notary public a power of attorney (exhibit B), appointing three persons as their attorneys to effect the transfer of the land, and such power of attorney contained an admission in the following terms:—" We received the " whole price in cash and in advance from the hands of the said " purchaser at the time of signing this power of attorney."

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(1) (1941) 8 P. L. R. 563.

In her statement of claim the appellant alleged, in effect, that a fraud was perpetrated on her and her sister in so framing the power of attorney as to enable three persons to act " jointly " and severally," and in the conduct of one of the attorneys who completed the transfer on behalf of the vendors by production of a copy of the power of attorney and without receiving the balance of the purchase money. In their defence, the respondents relied on the admission in the power of attorney, and later by the agent in the Land Register, that the money had been paid in full, and claimed that such admission was conclusive. The alleged admission of the agent in the Land Register formed no part of the record.

At the trial, the District Court of Nablus heard the evidence of the appellant and respondent No. 1, and, considering that from such evidence it was doubtful whether the purchase money had been paid, decided to hear further evidence on a later date. Further evidence was accordingly heard, and the court decided that the appellant had not proved the fraud alleged, though the judges considered the circumstances of the transfer suspicious. They held, however, on the evidence, that only £P. 50 had been paid to the appellant and her sister and relied, in their judgment, on a statement by respondent No. 1, that he had paid part of the purchase money to the appellant and the rest to respondent No. 2, " without authority " of plaintiff," words which were not to be found in the transcript of the evidence of respondent No. 1. In the result the court gave judgment against respondent No. 1 for £P. 650 with costs, and dismissed the suit against respondent No. 2 without costs.

Respondent No. 1 appealed to the Supreme Court of Palestine (Rose and Edwards JJ.), which allowed the appeal with costs. The view of the Supreme Court was that the

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present appellant having failed to prove fraud was bound by her admission of the receipt of the purchase money in the power of attorney, and that the lower court was wrong in allowing evidence to be given on the question whether the amount had been paid.

1945. Feb. 26, 27. *Khambatta* for the appellant. The question is whether oral evidence is admissible to prove part payment only of the purchase price, so as to rebut the presumption raised by the admission that the consideration had been paid in full. The issue of fraud does not arise, there being concurrent findings which bind the appellant. [Reference was made to arts. 79, 1588, 1589 and 1778 of the Mejelle.] Section 14 of the Evidence Ordinance, 1924, has been relied on in some authorities to say that oral evidence is admissible to prove payment of part consideration only, and is not necessarily confined to the evidence of the person in whose favour the admission is made, but, as the sections say, either party may give evidence on his own behalf. [Reference was made to *Jarad and Others* v. *Attorney-General* (1), *Zvi Gaber* v. *Migdal Insurance Company, Ld.* (2), *Rackovsky and Another* v. *Danon* (3), Civil Appeal 19/41 (Palestine) (4), and *Apostolic Throne of St. Jacob* v. *Saba Said* (5).] The question in the last cited authority was whether there was an admission within art. 79, and the Board held that there was not. The pronouncement of the Board was to the effect that the admission raised in arts. 79 and 1588 of the Mejelle does not amount to a conclusive presumption of law, but is a rebuttable presumption of fact to be proved by the evidence.

Quass for the respondents. The fundamental error in the proceedings in the District Court was in hearing the evidence of persons other than the parties. A party in Palestine is bound by his admission, whether oral or in writing, and the only way in which he can establish his case in the face of an admission—or get over the difficulty—is by proving fraud or by administering the oath under art. 1589 of the Mejelle to his opponent. Here there were concurrent findings that the respondents were not guilty of fraud, and the only way, therefore, in which the appellant could possibly have sought to nullify the effect of her admission that she had been paid in full was to call on the first respondent to take an oath that such admission was not false. The same point regarding the oath arose in Privy Council appeal No. 38 of 1928 (1), and, as indicating how fundamental this matter is in Palestine, two out of the first three cases reported in the first volume of the Palestine Law Reports deal with this very matter: *Khadijeh Ismail Abu Khadra* v. *Amneh Khalil Abu Khadra* (2) and *Armenian Patriarchate* v. *Jabrieh* (3), which latter is like this case. Case after case shows the question that is administered in the decisive oath: *Goldstein* v. *Hamdi and Another* (4); the specific questions are put by the court, and those are the questions which have to be answered.

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(1) (1938) 6 P. L. R. 111.
(2) (1938) 6 P. L. R. 187.
(3) (1938) 6 P. L. R. 391.
(4) Unreported.
(5) (1936) 6 P. L. R. 528.

Khambatta replied. *Khadijeh Ismail Abu Khadra* v. *Amneh Khalil Abu Khadra* (2) does not bear on the question now in issue. With regard to *Armenian Patriarchate* v. *Jabrieh* (3) and the decisive oath, that was a decision of 1921, before the Evidence Ordinance, and is distinguishable on that ground. All it says is that the oath should have been administered. *Goldstein* v. *Hamdi and Another* (4) also goes no further than that. Those cases are in accord with the Mejelle. The provisions of the Mejelle, however, must be read with the Evidence Ordinance. If this case is sent back for the oath to be administered the Board would have to say that the decision in *Zvi Gaber* v. *Migdal Insurance Company, Ld.* (5) was wrong, and that the Evidence Ordinance does not supersede the Mejelle, and that the decision in *Jarad and Others* v. *Attorney-General* (6) that it does is also wrong.

Apr. 18. The judgment of their Lordships was delivered by Sir John Beaumont, who stated the facts set out above and continued: The question before the Board is whether the decision of the Supreme Court was right, and in that connexion certain provisions of the Mejelle are relevant. Their Lordships take the translation of Mr. Tyser. Article 79 provides that "by his admission one is condemned." Article 1588 provides: "It is not lawful to go back from the admissions concerning "the rights of people. So that, after someone has said 'I owe "'so many piastres to such an one,' if he say, 'I go back from "'my admission,' no attention is paid to it. He is judged by

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(1) Unreported.
(2) (1920–33) P. L. R. 1.
(3) (1920–33) P. L. R. 4.
(4) (1920–33) P. L. R. 118.
(5) (1938) 6 P. L. R. 187.
(6) (1938) 6 P. L. R. 111.

"his admission." Article 1589 provides: "If anyone maintains that he has not spoken the truth in an admission "which has been made, the person in whose favour the "admission was made is made to take an oath that it is not "false. For example—after a person has given a final voucher "which says: 'I borrowed so many piastres from such an "'one,' if he says, 'Although in truth I gave a voucher which "'says I borrowed those piastres, I have not received from "'him the sum of money mentioned up to the present time,' "the person in whose favour the admission is made is made to "take an oath that there has not been falsehood in the "admission of the person."

It is clear from other portions of the Mejelle that great importance is attached to the taking of the oath. Book XV., ch. 3, deals with the administering of the oath to one of the parties. The oath has to be administered in a special form (art. 1743). It must be taken only in the presence of the judge or his representative (art. 1744). The oath is only administered on the application of a party, except in four instances which are not relevant to this case (art. 1746). In civil actions, when the oath is proposed to a person who is bound to take the oath, and he refuses, the judge gives judgment based on his refusal (art. 1751).

It was argued before the Board that these provisions of the Mejelle were over-ridden by the Evidence Ordinance, 1924, s. 14, which provides "In a civil case either party may give "evidence on his own behalf or be summoned to give evidence "for the other party." Their Lordships are satisfied that the express enactments of the Mejelle as to admissions are not over-ridden by so general a provision, and, indeed, the contention to the contrary is inconsistent with the statement in the judgment of this Board in *Apostolic Throne of St. Jacob* v. *Saba Said* (1), that the legal effect of admissions in Palestine is to be found in the Turkish Code (the Mejelle), which provides in art. 79 that "a person is bound by his own admission," and in art. 1588 that "no person may validly retract an admission "made with regard to private rights."

Their Lordships think that there was some irregularity in the proceedings in the District Court. The court had to consider not only the effect of the admission of the plaintiff, but also the plea of fraud raised by her. If that plea had succeeded the admission by her would have been displaced,

(1) (1939) 6 P. L. R. 528, 534.

either on the general principle that fraud vitiates every transaction, or under art. 1610 of the Mejelle. But when the plaintiff failed to establish fraud, the court was left with her admission of the receipt of the money and, in their Lordships' view, the binding character of that admission could only be displaced by the plaintiff requiring the defendant to take an oath under art. 1589 that the admission in its exact terms was true. No doubt respondent No. 1 did give evidence which suggests that the admission was not true, but their Lordships are not satisfied that he was ever asked to swear specifically as to the truth of the admission under art. 1589. Their Lordships have not forgotten that it was for the plaintiff to demand the oath, which she omitted to do, but this may well have been because the Supreme Court of Palestine had held in *Khadijeh Ismail Abu Khadra* v. *Amneh Khalil Abu Khadra* (1) that an admission in an official document did not come within the meaning of art. 1589 of the Mejelle, and that the defendant could not therefore be called on to take the decisive oath to the effect that the plaintiff's admission acknowledging receipt of money before the Land Registrar was not false. This case is referred to in the judgment of the Supreme Court in *Zvi Gaber* v. *Migdal Insurance Company, Ld.* (2), as of somewhat doubtful authority, though it is stated to have been followed. Their Lordships think that the decision was wrong. There is no exception in art. 1589 or admissions made in official documents, nor do their Lordships see any good reason why there should be. That an admission is made in an official document may afford some guarantee that it is genuine, but not that the facts admitted are true. This would depend on evidence not generally available to the public officer concerned.

In these circumstances, their Lordships think that the fairest course is to remit this case to the District Court of Nablus with directions to allow the plaintiff an opportunity of requiring the defendant to take the special form of oath under art. 1589 of the Mejelle that the admission made by the plaintiff and her sister that they received the whole price in cash and in advance from the purchaser at the time of signing the power of attorney (exhibit B) is not false. If that oath is taken no evidence to prove the admission false will be admissible, and the suit will fail. If it is not taken, the court will be free to act on the view which it formed on the evidence, and judgment will go against respondent No. 1.

(1) (1920–33) P. L. R. 1.

(2) (1938) 6 P. L. R. 187.

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Their Lordships will therefore humbly advise His Majesty that this appeal be allowed and that the case be remitted to the District Court of Nablus with the directions which their Lordships have indicated. The costs of the appeal to His Majesty in Council must be paid by the respondents. The costs of the proceedings in Palestine will follow the event.

Solicitors for appellant : *Lake & Son.*
Solicitors for respondents : *T. L. Wilson & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*

1944

Nov. 21, 23.

1945

Jan. 25.

CRICKLEWOOD PROPERTY AND INVESTMENT TRUST, LIMITED . } APPELLANTS

AND

LEIGHTON'S INVESTMENT TRUST, LIMITED . . . . } RESPONDENTS.

Landlord and tenant—Building lease—Frustration—War—Inability to carry on building operations—Liability to pay ground rent.

By a building lease dated May 12, 1936, certain land, forming part of a building estate, was demised to lessees for a term of ninety-nine years, to be used by them as sites on which they covenanted to erect a number of shops within a time limit. So far as concerned each of the sites here in question, the rent reserved was a peppercorn till the expiration of one year from notification by the lessors that erection of a shop thereon might proceed, under the terms of a town planning scheme then in force, and thereafter 35*l.* yearly. Notification having been given in respect of the sites, the lessors claimed payment of the ground rents. The lessees repudiated liability on the ground that the obligation to pay rent had been excused or discharged by frustration, since the war-time restrictions placed by the Government on building had made it impossible to erect the shops :—

Held, unanimously, that even if the doctrine of frustration could apply to a lease, the circumstances did not justify such application ; the lease had not been determined by frustration, and the liability for rent continued.

Per VISCOUNT SIMON L.C. and LORD WRIGHT : The doctrine of frustration may in certain circumstances apply to a lease.

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* *Present :* VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD PORTER and LORD GODDARD.

Per LORD RUSSELL OF KILLOWEN and LORD GODDARD: The doctrine of frustration can never apply to put an end to a lease.

Matthey v. *Curling* [1922] 2 A. C. 180 discussed.

Decision of the Court of Appeal (sub nom. *Leighton's Investment Trust, Ld.* v. *Cricklewood Property and Investment Trust, Ld.*) [1943] K. B. 493, affirmed.

APPEAL from the Court of Appeal.

The facts, stated by VISCOUNT SIMON L.C. and LORD WRIGHT, were as follows: By a lease dated May 12, 1936, the predecessors in title of the respondents demised certain land at Potters Bar to the appellant company for a term of ninety-nine years from March 25, 1936, and the other two appellants joined in the lease as guarantors for the payment of the rent and performance of the covenants. The lessors were developing a building estate for residential purposes and the lease in question was a building lease under which the appellants were to build a number of shops to form what is commonly called a shopping centre for the residents on the estate. The subject of the demise was two parcels of land adjoining the residential area, one coloured red and the other blue on the plan attached to the lease. A question had previously arisen between the lessors and the local authority under a town planning scheme for the area and there had been an appeal to the Minister. This appeal was compromised on terms which were scheduled to the lease and which in effect provided that not more than twenty-four shops in all should be built on these two parcels of land; that eight might be built at once, and, in addition, that not less than four shops to each two hundred houses occupied should be permitted to be built in the future till the total of twenty-four was reached. The rent reserved by cl. 1 was the aggregate of the following rents, (*a*) as to each of the ten shop sites on the red land a peppercorn for the first year and thereafter a yearly rent of 35*l.* for each site, and (*b*) as to each of the fourteen shop sites on the blue land a peppercorn till the expiration of one year from notification by the landlords that erection of a shop thereon might proceed and thereafter a yearly rent of 35*l.* for each site in respect of which such notification had been given. This notification that building might proceed was rendered necessary because of the compromise referred to above. Clause 2 of the lease contained covenants by the appellant company to pay the rent and outgoings and to build twenty-four shops on the demised land, ten on the red and fourteen on the blue. The first eight were to be built on the red land not later than March 25, 1937; the remainder were to be built within one year from the notification by the landlords that building might proceed, but in certain circumstances, which need not be set out in detail, an "abeyance period," as it was called, might arise which would have the effect of postponing the obligation to build beyond the year. It was, however, expressly provided that nothing in the clause which provided for this abeyance period should "in any way affect the rent or rents payable in "respect of the demised property or any part thereof or the "time or manner of such payment." The lease, by cl. 3, gave the appellant company the option to purchase the freehold of the demised property; both the red and blue sites. (This option was exercised as regarded the red sites and accordingly no question arose in connexion with them or with the shops built on them.) By cl. 4, a right of re-entry for non-payment of rent or breach of covenant was reserved, but it was provided by cl. 5, that after any of the shops had been assigned or underlet this right should only be exercisable upon the particular shop in respect of which the breach had occurred, the intention being that each should be held separately and independently of the others. There was also a provision in cl. 6 of the lease enabling the appellant company, at the expiration of seven years from the date of the agreement, to give notice to determine the lease as to any of the sites in respect of which notice that building might proceed had not been given. As regarded the blue land, no shops had been erected when notice that building might proceed was given as to two sites on September 24, 1937. Further notices were given on May 30, 1938, and August 25, 1939, in each case as to four sites. No building was begun on any of these ten sites. On May 17, 1938, the original lessors conveyed the land subject to and with the benefit of the lease to the respondents, and as the appellant company paid no rent after the outbreak of war, the respondents issued a writ dated April 8, 1942, against the appellant company as tenants and against the other two appellants as guarantors, claiming arrears of rent since September, 1939, this being the only claim in the action. The shop sites in respect of which rent was claimed were six in the earlier period till September 30, 1940, and ten in the later period till March 25, 1942, all of them forming part of the fourteen sites included in the land marked blue on the plan. If the appellants were liable for any rent, there was no dispute

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that the amount due in the action was 419*l.* 14*s.* 3*d.* The writ was specially endorsed under Or. 14, and the respondents applied for summary judgment. The appellants filed an affidavit by way of defence, para. 6 of which was in the following terms: "No obligation on the part of the [appellant] "company to erect shops upon any of these fourteen sites "arose until after the outbreak of the present war. By "reason of the outbreak of the war the demand for these shops "ceased, finance for their erection became unobtainable, and "the restrictions placed by the Government upon building "and materials therefor made it impossible to erect shops "upon any of these sites or to continue the development of "the same." The appellants in para. 7 of their affidavit went on to submit that in consequence of the facts so alleged the agreements as to the fourteen sites were frustrated and the appellants were under no liability thereunder. On this affidavit the master gave leave to defend and on appeal to the judge in chambers the respondents declared that they did not dispute the allegations in para. 6. Thereupon the judge gave the appellants liberty to defend on these allegations of fact and no others, the admission being embodied in his order. He made the usual order for trial in the short cause list; the affidavit was treated as a pleading and no further defence was ordered. Asquith J., who tried the case, rejected the appellants' defence and gave judgment for the respondents. He said that the sole issue before him was whether the doctrine of frustration applied to a building lease such as that involved in the case. He held that it did not, though if it did he would have held that the contract had been discharged. However, he thought, there was clear authority that the doctrine of frustration cannot be applied to a demise of real property. The Court of Appeal affirmed his judgment on the ground that the doctrine of frustration could not be applied to a lease of real estate. The appellants appealed to the House of Lords.

Roland Burrows K.C. and *Fortune* for the appellants. On principle there is no reason why the doctrine of frustration should not apply to a building lease. In *Krell* v. *Henry* (1) and the coronation cases, there was no suggestion that the distinction between a lease and a licence was cardinal: see also *Taylor* v. *Caldwell* (2). In Scotland it is not impossible for a lease to come to an end by reason of circumstances which

(1) [1903] 2 K. B. 740.

(2) (1863) 3 B. & S. 826, 832.

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frustrate it: *Tay Salmon Fisheries Co., Ld.* v. *Speedie* (1). There is no authority binding on the House of Lords excluding a lease from the doctrine of frustration, though it is rare to find a set of circumstances in which it can be said that a lease has been frustrated. The consequence of frustration must be that the lease comes to an end and with it all the covenants, so that either party can rely on the frustration. Originally a lease was merely a contract between landlord and tenant. It gave no rights that could be called property rights and if the tenant were dispossessed his remedy was against his landlord only. With the Statute of Gloucester in 1278 the position began to change and in its evolution the tenant acquired property rights in that if he were dispossessed he could claim against the wrongdoer, having thus a right in rem which he could enforce on his own account without having to look to his landlord for redress. However, the position of the landlord did not change, since the chattel interest of the tenant did not affect the legal estate. That was something which must always be in existence vested in someone. A lease, on the other hand, still remained a contract and the leasehold interest could arise or cease according to the contract by which it was regulated. It has been suggested that frustration cannot apply to a lease because a lease creates rights in property, but in *Paradine* v. *Jane* (2), the case which lies at the root of all the others on this subject, that point was not relied on as affecting the matter. There is no difficulty in applying the doctrine of frustration to cases where rights of property are involved. [They referred to *London & Northern Estates Co.* v. *Schlesinger* (3); *Whitehall Court, Ld.* v. *Ettlinger* (4); *Matthey* v. *Curling* (5); *Swift* v. *Macbean* (6); and *Duke of Westminster* v. *Howard* (7).] In the case of this lease, on the true meaning and implications of the contract in the circumstances of this case, the lease of the fourteen sites, or alternatively the obligations to build and pay rent, were dissolved or excused or suspended. This document must be construed as a whole to see what the adventure really was: *Denny Mott & Dickson, Ld.* v. *James B. Fraser & Co., Ld.* (8). The doctrine of frustration applies to this lease because it was in effect a commercial venture. This lease has no meaning unless the tenant is able to build on the land. It contemplates peace conditions throughout and the interruption caused by government restrictions on building and materials strikes at the root of the contract.

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(1) 1929, S. C. 593.
(2) (1646) Aleyn 26.
(3) [1916] 1 K. B. 20.
(4) [1920] 1 K. B. 680.
(5) [1922] 2 A. C. 180, 199.
(6) [1942] 1 K. B. 375.
(7) (1941) 85 Sol. J. 106.
(8) [1944] A. C. 265.

Field K.C. and *Douglas Lowe* for the respondents. The doctrine of frustration cannot apply to this lease on its express terms. It is clear from cl. 2 that the rent was to be payable whether or not the shops were erected. Further, in cl. 6, the parties have provided the particular circumstances in which the lease could be terminated by notice. On the wider point, the doctrine of frustration cannot apply to a demise of land. The Law of Property Act, 1925, makes it clear, by s. 1, sub-s. 1, that a lease is not a mere contract; it amounts to an estate: see also s. 205, sub-s. 1 (xxvii.) and Halsbury's Statutes of England, vol. 15, p. 177. The true principles applicable are to be found in the speech of Lord Atkinson in *Matthey* v. *Curling* (1) and in the judgments of Lord Reading C.J., in *Whitehall Court, Ld.* v. *Ettlinger* (2), and of Lush J. in *London & Northern Estates Co.* v. *Schlesinger* (3). In *Krell* v. *Henry* (4) and the coronation cases there was no question of a lease. In *Taylor* v. *Caldwell* (5) it was expressly stated that there was no demise. The Landlord and Tenant (War Damage) Act, 1939, was deliberately passed to deal with the case of houses in which no one could live but for which the tenants were liable to pay rent.

Roland Burrows K.C. in reply. Both parties were vitally interested in the joint adventure of building a residential estate. The respondents were interested, not only in the rent but also in proper development. At the time of the lease the only difficulties existing were those under the town planning scheme. It was assumed that a state of peace would continue and the parties did not contemplate the situation which would arise if war broke out. The war changed the whole position: see McNair on Legal Effects of War (2nd ed.), p. 156. The circumstances in the present case were similar to those in *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (6). It appears from the argument in *Krell* v. *Henry* (7) that the

(1) [1922] 2 A. C. 180, 237.
(2) [1920] 1 K. B. 680, 687.
(3) [1916] 1 K. B. 20, 24.
(4) [1903] 2 K. B. 740.
(5) 3 B. & S. 826, 832.
(6) [1918] A. C. 119.
(7) [1903] 2 K. B. 740, 744, 745.

question of a letting was considered. In *Taylor* v. *Caldwell* (1) Blackburn J. said that nothing depended on whether or not it was a case of a letting, and since that was a considered judgment it should be taken as it stands. [He also referred to *Perfect Homes, Ld.* v. *M. Howard (Mitcham), Ld.* (2) in the Court of Appeal.]

THE HOUSE took time for consideration.

Jan. 25, 1945. VISCOUNT SIMON L.C. My Lords, before this House, and apparently in both courts below, the appellants did not attempt to rely on the fact that the demand for shops had ceased, or on their inability to procure finance, as establishing a defence. They relied entirely on the impossibility of building created by the restrictions imposed on work of this character and on the acquisition of materials. Though these restrictions were not particularized it must be taken that they were imposed by valid orders or prohibitions under the Defence Regulations, and while it would have been more satisfactory if the documents relied on had been set out or referred to, the case has proceeded (as must this appeal) on the footing that the performance of the covenant to build was impossible, and continues to be so while the orders or prohibitions are in force. Asquith J., who tried the case, held on the authorities that the doctrine of frustration did not apply to a lease at all, and that for this purpose there was no distinction between a building lease and any other lease, though he said that had the doctrine applied he would have decided that the contract had been discharged. The Court of Appeal, in a judgment delivered by MacKinnon L.J., said (3) that the doctrine had never been applied to a demise of real property and that there was clear authority that it cannot be. "It is impossible for the "defendants to rely on the doctrine of frustration to relieve "them from their obligations as tenants under a demise of "land for ninety-nine years." Against that judgment the tenants appeal to this House. Two questions are raised by the appeal: first, can the doctrine of frustration apply to determine a lease? and, secondly, even if it can, are the circumstances in the present case such as to produce the result that the lease has been determined by frustration? If, my Lords, we all agree (as I understand we do) that the answer to the second question is in the negative, it is not essential in the present case to reach a conclusion on the first question (as to which I gather that our opinions are divided). Nevertheless, I propose to express my opinion with regard to both questions, since the more general issue has been much discussed and was pronounced on in the courts below, where it was regarded as concluded by authority, including the authority of this House, in *Matthey* v. *Curling* (1).

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(1) 3 B. & S. 826, 832.

(2) (Unrep.) Sept. 16, 1942.

(3) [1943] K. B. 493, 496.

The broad issue must first be considered as though it were res integra: then I propose to consider the effect of previous decisions. Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If, therefore, the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally, if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Neither, of course, does it arise where one of the parties has deliberately brought about the supervening event by his own choice. (See the cases collected in *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (2).) But where it does arise, frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from their volition. Is there any good reason why this conception of frustration should not ever apply to a lease of land and result in its premature determination? I do not feel able to assert any a priori or absolute impossibility, though the instances in which the doctrine might apply to such a lease are undoubtedly very rare.

A lease of land creates in the lessee an estate, which is a chattel interest. (Law of Property Act, 1925, s. 1, sub-s. 1 (*b*).) Such an estate, by the nature of the case, lasts at most for the term stipulated and may come to an end sooner. In normal circumstances, the estate continues to exist for the period of the agreed term—in the present instance, for ninety-nine years from March 25, 1936—but it is liable to

(1) [1922] 2 A. C. 180.

(2) [1942] A. C. 154, 160.

be determined by the landlord's re-entry for non-payment of rent or for breach of covenant. This is expressly provided for by cl. 4 of the present lease. The question therefore is whether, in addition to pre-determination under such express provisions, it is possible that a lease for years should pre-determine from a supervening cause which amounts to frustration. If so, the term ends, no further rent is payable, and the lessor recovers the property with all permanent structures erected upon it, at once. It is said that this cannot be so, because a lease is more than a contract and amounts to an estate: but this reasoning seems to me to be dangerously near to arguing in a circle; if we assume that frustration can only arise in cases where there is a contract and nothing else, the conclusion of course follows that frustration cannot arise in the case of a lease. Where the lease is a simple lease for years at a rent, and the tenant, on condition that the rent is paid, is free during the term to use the land as he likes, it is very difficult to imagine an event which could prematurely determine the lease by frustration—though I am not prepared to deny the possibility, if, for example, some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea. The lease, it is true, is of the "site," but it seems to be not inconceivable that, within the meaning of the document the "site" might cease to exist. If, however, the lease is expressed to be for the purpose of building, or the like, and if the lessee is bound to the lessor to use the land for such purpose with the result that at the end of the term the lessor would acquire the benefit of this development, I find it less difficult to imagine how frustration might arise. Suppose, for example, that legislation were subsequently passed which permanently prohibited private building in the area or dedicated it as an open space for ever, why should this not bring to an end the currency of a building lease, the object of which is to provide for the erection on the area, for the combined advantage of the lessee and lessor, of buildings which it would now be unlawful to construct? It is no answer to say that it may be presumed that the legislature would make express provision, by compensation clauses or otherwise, to deal with such a case: we are entitled to test the applicability of the doctrine by assuming supervening illegality, without any qualification. Neither, I think, is the theoretic possibility of frustration got rid of by stressing the complications that might in some cases arise between the parties if the relation of

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lessor and lessee is prematurely terminated for all purposes by such a cause. In the case of pure contract also, the situation resulting from frustration has raised questions of difficulty which, after forty years of doubt, were only settled by the decision of this House in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ld.* (1); and even then it was considered just and necessary to modify the common law consequences by a subsequent Act of Parliament, the Law Reform (Frustrated Contracts) Act, 1943 (6 & 7 Geo. 6, c. 40.)

I now turn to the cases. A careful examination of the decided cases to which the Court of Appeal refers satisfies me that it is erroneous to suppose that there is authority binding on this House to the effect that a lease cannot in any circumstances be ended by frustration. In *Matthey* v. *Curling* (2), the House did not say so: the decision there was that requisitioning by the Government was no answer to a claim on the covenant for rent, any more than ouster by a trespasser would be: the remedy of the tenant was against the Government for compensation. Equally, destruction by fire, after the Government had requisitioned the place, left the tenant still liable on his covenant to deliver up in proper condition, for the tenant could have covered the risk by insurance. Thus, on the true construction of the document, the two covenants still bound the tenant. It seems clear that, if the actual decision in *Matthey* v. *Curling* (2) is as above set out, the Court of Appeal was mistaken in treating it as "clear "authority" that the doctrine of frustration "cannot" be applied to a demise of real property. It is noteworthy that when *Matthey* v. *Curling* (3) was before the Court of Appeal, Atkin L.J., in his dissenting judgment, observed: "it does "not appear to me conclusive against the application to a "lease of the doctrine of frustration that the lease, in addition "to containing contractual terms, grants a term of years. "Seeing that the instrument as a rule expressly provides for "the lease being determined, at the option of the lessor, upon "the happening of certain specified events, I see no logical "absurdity in implying a term that it shall be determined "absolutely on the happening of other events—namely, those "which in an ordinary contract work a frustration." This passage exactly expresses my view. I may further point out that in *Taylor* v. *Caldwell* (4), when the question was raised whether the hall which was burnt down was demised to the defendant or not, Blackburn J. said (1): "Nothing however, "in our opinion, depends on this." The impression, which I venture to think is erroneous, that this House in *Matthey* v. *Curling* (2) actually decided that frustration cannot arise in the case of a lease, is encouraged by the headnote to that case in the Law Reports, which states that that decision affirmed *Whitehall Court, Ld.* v. *Ettlinger* (3). It is true that Lord Atkinson in *Matthey* v. *Curling* (4) expressed the view that the *Whitehall Court* case (3) was rightly decided, but none of the other Lords either said or implied this. Moreover, in the *Whitehall Court* case (3) Lord Reading C.J.'s primary decision was that the mere fact that the tenant was personally prevented from residing in the leased flat did not affect the existence of the chattel property vested in him under the lease. It is true that Lord Reading gave a further reason for his decision, which was based on the adoption of a sentence in Lush J.'s judgment in *London & Northern Estates Co.* v. *Schlesinger* (5), but in this last quoted case also the actual decision of the Divisional Court was that a tenancy was not extinguished because the tenant for the time being was not allowed by law to inhabit the flat which had been leased to him. This was the ground of decision on which both members of the Divisional Court—Avory and Lush JJ.—concurred, and though Lush J. added that a tenancy agreement was more than a contract and that the chattel interest created by the lease continued to be vested in the tenant, he did not in fact, I think, advance the abstract proposition that a lease can never be determined by events equivalent to frustration. At any rate, this House is not obliged to accept such a proposition, and, as I have indicated, I think it goes too far. The occasions, however, on which frustration terminates a lease must be exceedingly rare.

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(1) [1943] A. C. 32.
(2) [1922] 2 A. C. 180.
(3) [1922] 2 A. C. 199, 200.
(4) (1863) 3 B. & S. 826.

So much for the abstract and theoretical question. But there remains the practical issue whether what is proved to have happened in the present case could be enough to constitute frustration of such a lease. I do not agree with Asquith J. that the orders requiring a suspension of building are sufficient to strike at the root of the arrangement. The lease at the time had more than ninety years to run, and though we do not know

(1) (1863) 3 B. & S. 832.
(2) [1922] 2 A. C. 180.
(3) [1920] 1 K. B. 680.
(4) [1922] 2 A. C. 180, 237.
(5) [1916] 1 K. B. 20, 24.

how long the present war, and the emergency regulations which have been made necessary by it, are going to last, the length of the interruption so caused is presumably a small fraction of the whole term. Frustration, where it exists, does not work suspension but brings the whole arrangement to an inevitable end forthwith. Here, the lease itself contemplates that rent may be payable although no building is going on, and I cannot regard the interruption which has arisen as such as to destroy the identity of the arrangement or make it unreasonable to carry out the lease according to its terms as soon as the interruption in building is over: this is the nature of the test for frustration suggested in the well-known case of *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (1). I therefore conclude, on the facts, that the liability for rent under the covenant continued uninterrupted, and I move your Lordships to dismiss the appeal with costs.

LORD RUSSELL OF KILLOWEN (read by LORD PORTER). My Lords, I share the opinion, which all your Lordships entertain, that no question as to what is called frustration can arise on the facts of the present case. Unfortunately we have no pleadings and little evidence, owing to what seems to me a regrettable attempt to take a short cut in an important case. We must therefore assume it to be true (owing to an admission made by the respondents in Judge's Chambers) that no obligation on the part of the appellant company to erect shops on any of the fourteen blue sites arose until after the outbreak of the war, and that government restrictions on buildings and building materials made it impossible to erect shops on any of those sites. It seems, however, equally true, that if it had chosen so to do, it had ample time before September 3, 1939, to erect shops on six of the sites. But apart from this last-mentioned fact, all that has happened is that for a portion of a span of ninety-nine years the erection of shops on the sites has been postponed, with the result that for a time the appellant company will be liable to pay a rent of 35*l.* per annum in respect of each site, although no shop has been erected thereon. But that is to carry out the very provisions of the lease which is said to be frustrated. The rent thereunder is payable in respect of sites, not in respect of shops; and cl. 2, after fixing times within which the tenant has to erect shops, provides in terms that nothing in the clause should in

(1) [1918] A. C. 119.

Lord Russell of Killowen.

any way affect the rent or rents payable in respect of the demised property or any part thereof or the time or manner of such payment. It seems to me clear that the intention of the parties was that rent would be payable even though the sites were vacant, and that the landlord was not to be driven to sue for damages for breach of covenant to erect shops. To such an action the war-time restrictions might well afford a defence, but that is a consequence very different and far removed from frustration. Therefore, even on the assumption that the doctrine of frustration can be applied to a lease, this appeal must fail.

On the broader question I confess that I am unable to grasp how the doctrine of frustration can ever apply so as to put an end to a lease and the respective liabilities of landlord and tenant thereunder. A lease is much more than a contract. It creates and vests in the lessee an estate or interest in the land, a chattel interest, it is true, but a vested estate or interest none the less. As was said by Lush J. in *London & Northern Estates Co.* v. *Schlesinger* (1) " It is not correct to speak of this " tenancy agreement as a contract and nothing more. A term " of years was created by it and vested in the appellant, and " I can see no reason for saying that because this order dis- " qualified him from personally residing in the flat, it affected " the chattel interest which was vested in him by virtue of the " agreement. In my opinion it continues vested in him still." That dictum of Lush J. was approved in *Whitehall Court, Ld.* v. *Ettlinger* (2), a case which itself was approved by Lord Atkinson in your Lordships' House without any dissent from his colleagues in the case of *Matthey* v. *Curling* (3). When a contract is frustrated it is because what is called the " venture " or " undertaking " in which the parties have contracted to engage can no longer be carried out. The court in such circumstances declares the contract to be, or treats it as being, no longer binding on the parties. That is an end of the matter. But when a lease is in question, and has been granted by one to another, it is the lease which is the " venture " or " under- " taking " upon which the parties have embarked. The contractual obligations thereunder of each party are merely obligations which are incidental to the relationship of landlord and tenant created by the demise, and which necessarily vary with the character and duration of the particular lease. It may well be that circumstances may arise during the currency of the term which render it difficult, or even impossible, for one party or the other to carry out some of its obligations as landlord or tenant, circumstances which might afford a defence to a claim for damages for their breach, but the lease would remain. The estate in the land would still be vested in the tenant. I know of no power in the court to declare a lease to be at an end except upon findings that some event has occurred on the happening of which the lease terminates by reason of some express provision contained in the document. In such a case the term ends not because the court exercises a power to terminate it, but because in the events which have happened the lease operated only as a demise for the shorter period. Nor do I know of any power in the court to order a tenant (who, be it observed, might have sublet part by way of mortgage or otherwise) to surrender his term to the landlord. The lease must of necessity continue. Some of the obligations thereunder may from time to time, from various circumstances, become difficult or impossible of performance by one or other of the parties; but, in my opinion, it cannot have applied to it the doctrine of frustration. The rent will continue to be payable in accordance with the terms of the document.

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(1) [1916] 1 K. B. 20, 24.
(2) [1920] 1 K. B. 680, 686, 687.
(3) [1922] 2 A. C. 180, 237.

Since preparing my opinion in this case I have had an opportunity of perusing a print of the remarks which my noble and learned friend Lord Wright proposes to address to your Lordships and of considering the numerous references therein to a series of authorities cited by him. I wish to guard against it being said that your Lordships are in agreement with all my noble friend's statements. For myself I disagree with many of them: in particular I disagree with the view in relation to a lease of land, which is expressed in the following terms: "If the contract is avoided or dissolved, as it may be "by either party, under the express terms of the lease, the "estate in land falls with it." If by these words my noble friend only wishes to record the proposition that the exercise of a power to determine a lease will put an end to the lessee's estate in the land, well and good; but if he means that the estate in land necessarily comes to an end with cesser of contractual liability, I disagree. A lease may come to an end, and with it the estate in the land and all contractual liability by virtue of some provision in the lease, or by reason of some defect in the title of the person who purported to grant it. But, in my opinion, the cesser or suspension of some contractual liability under the lease will not destroy the estate in land which is vested in the lessee, unless the lease provides that in that event the term of years shall cease. Further I disagree with the view that there is anything in Lord Buckmaster's judgment in the case of *Matthey* v. *Curling* (1) or in the cases of *Brewster* v. *Kitchell* (2) or *Baily* v. *de Crespigny* (3) inconsistent with the view that the doctrine of frustration cannot apply to a lease of land, or favouring the view that it may so apply. I concur in the motion proposed.

LORD WRIGHT. My Lords, while I agree that the appeal must fail and the decisions of the courts below must be upheld, I prefer to base my conclusion on the ground that whether the doctrine of frustration can apply or not to a demise of land, no circumstances are shown in the present case which would excuse the appellants from their covenant to pay rent for the ten shop sites, which are the sites in respect of which rent is claimed. I think the case is concluded by the principles laid down by this House in *Matthey* v. *Curling* (1) in the opinion delivered by Lord Buckmaster, concurred in by Lords Sumner, Wrenbury and Carson. Lord Atkinson gave a separate opinion agreeing in the result. In that case demised premises had been lawfully requisitioned by the military authorities who continued in occupation during the remainder of the term. A month before the term ended the house was destroyed by fire. The claims in the action which the lessor brought against the lessee included (1.) rent for the last quarter; (2.) damages for breach of covenants including the covenant to repair and deliver up in repair. The defence as to the former was that the lessees had been evicted by a title or authority which they could not withstand. Lord Buckmaster said that there was not an eviction by title paramount or eviction by the lessor himself, but a mere eviction. He concluded that (4) the question was " how far the lessor has " been deprived of the benefit of his covenant, and an act " lawfully or unlawfully done, for which he is in no way " responsible, cannot, in my opinion, have that effect, unless " the covenant can be construed as excluding the event." Further, as to the repairing covenant, he held that the lessees were liable though the military had been in occupation when

(1) [1922] 2 A. C. 180.
(2) (1698) 1 Salk. 198.
(3) (1869) L. R. 4 Q. B. 180.
(4) [1922] 2 A. C. 227.

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the house was burnt and continued in occupation until some time after the term ceased by effluxion of time. Lord Buckmaster was also of opinion (1) that there was no impossibility of performance, though enjoyment of the premises had been interfered with by legal powers; he added "that a terminable "occupation by military authorities during an uncertain "time for which compensation may prove to be recoverable "constitutes no answer to the obligations of this repairing "covenant." It is clear that the agreed facts which the appellants rely on as relieving them from their obligation to pay rent under the covenant are not nearly so strong in their favour as those discussed by Lord Buckmaster. The appellants were not ejected in any shape or form from the demised premises. Neither the lessor nor anyone claiming under him interfered with the enjoyment of the land. All that happened was that for an uncertain term of the period, obviously likely to be short compared with the ninety-nine years of the lease, they could not proceed with their building scheme. The period of interruption is not stated, but it seems to be accepted that it is limited to the duration of the present emergency. The covenants to pay rent are absolute in terms and are expressly made independent of the progress of the building operations. It seems to me impossible to hold that these covenants are discharged by the facts alleged by the appellants in their affidavit. Even if the doctrine of frustration can be invoked in the case of a lease the interruption of the building operations cannot be regarded as likely to be so long in its duration as to destroy the basis or foundation of the lease and to lead the court to declare that it is dissolved on the principles applied by the court in order to determine if a contract is frustrated. Thus in *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (2), the test applied was whether the interruption was so long as to destroy the identity of the work and service when resumed with the work and service when interrupted, as Lord Dunedin put it (3), or in Lord Blackburn's words in *Dahl* v. *Nelson* (4), quoted by Lord Atkinson (5), whether the interruption was "so great and long as to make it "unreasonable to require the parties to go on." But a lease is more than a contract. It creates an estate in land (Law of Property Act, 1925, s. 1, sub-s. 1 (*b*).) The estate so created is limited and determined by the contractual terms of the lease and is governed by the agreement between the lessor and lessee. It may be that in earlier days the element of covenant bulked sometimes more largely in the eyes of the law than the question of tenure. In *Paradine* v. *Jane* (1), the judges do not mention the element of tenure. The claim was in debt. The court states the absolute character of the contract in language which has often been quoted (2): "When the party by his "own contract creates a duty or charge upon himself, he is "bound," they said, "to make it good, if he may, notwith-"standing any accident by inevitable necessity, because he "might have provided against it by his contract." Lord Atkinson in his opinion in *Matthey's* case (3) quotes these expressions as a general statement of contract law, but so unqualified a statement would not be consistent with the modern law relative to the discharge of contractual obligations by impossibility of performance, as explained by this House in *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (4) and other well-known authorities. Indeed, in *Constantine's* case (5), Lord Porter expressly enters a caveat against treating what he correctly calls the dicta which I have just quoted as universally applicable. I need not in detail refer to the mass of modern authority which would refute such a wide statement of the law. I may, however, refer to Lord Sumner's pithy description of the doctrine of frustration as "a device, by which the rules as to absolute contracts are "reconciled with a special exception which justice demands": *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (6). But the doctrine of frustration can only be held to be applicable after a careful consideration of the particular case, and in particular after scrutinizing the nature of the contract and the particular circumstances of the case. The nature of a lease not only involves a tenure as well as a contract, but has become the subject of precise rules which must be taken to be settled law of at least general application and to be understood by those who enter into transactions of lease. Hence I think the carefully guarded way in which Lord Buckmaster deals with the question before him in *Matthey's* case (7). He is careful to express no opinion as to the decision in *Whitehall Court, Ld.* v.

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(1) [1922] 2 A. C. 230.

(2) [1918] A. C. 119.

(3) Ibid. 130.

(4) (1881) 6 App. Cas. 38, 53.

(5) [1918] A. C. 119, 131.

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(1) (1646) Aleyn 26.
(2) Ibid. 27.
(3) [1922] 2 A. C. 180, 233.
(4) [1942] A. C. 154.
(5) Ibid. 203.
(6) [1926] A. C. 497, 510.
(7) [1922] 2 A. C. 180.

Ettlinger (1), which Lord Atkinson (2) says expressly "was "rightly decided." The majority of the House said nothing about the case, and I think the statement in the head-note that *Whitehall Court, Ld.* v. *Ettlinger* (1) was affirmed is not accurate if intended to apply to the judgment of the House. In *Whitehall Court, Ld.* v. *Ettlinger* (1) Lord Reading C.J. held indeed (3) that the requisition of the flats by the military authorities did not establish a case of eviction by title paramount and held (4) that there was "no reason why the chattel "interest which was vested in the tenant by virtue of the two "leases was affected merely because he was personally "prevented from residing in the flats." In so deciding he seems to me to follow the same lines of reasoning as Lord Buckmaster did in *Matthey's* case (5). Lord Reading also did perhaps recognize the distinction between an ordinary contract and a lease. But I cannot find that his language justified the head-note to the effect that the doctrine of the termination of a contract by the frustration of the adventure did not apply to the creation of an estate by demise. He was, I think, careful to limit his observations to the facts of the case before him. And in *London & Northern Estates Co.* v. *Schlesinger* (6), the lessee had become by the outbreak of war an alien enemy and prohibited from residing in the area in which the flat was situated. It was not difficult to hold that the prohibition did not put an end to the tenancy or discharge the obligation to pay rent, though the tenant's personal enjoyment of the premises was prohibited. On that ground the court held that performance of the contract was not rendered impossible. The tenant could, so it was held, sublet or assign the lease. That was enough to decide the case. Lush J., however, added (7) that nothing had happened in that case to affect the chattel interest vested by virtue of the agreement. He said, truly enough, that the tenancy agreement was not only a contract and nothing more, but a contract which created a term of years. It is clear that this is an element to be taken into account in considering whether events which have occurred, such as a requisition for a time or a destruction of the demised dwelling house by fire or the like have put an end to the tenancy or the tenant's obligations under the tenancy. It may be broadly said that as a general rule this

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(1) [1920] 1 K. B. 680.
(2) [1922] 2 A. C. 180, 237.
(3) [1920] 1 K. B. 680, 686.
(4) Ibid. 687.
(5) [1922] 2 A. C. 180.
(6) [1916] 1 K. B. 20.
(7) Ibid. 24.

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result does not follow casualties of that character, even though the tenant is deprived of the advantages at least for a time which the parties to the lease contemplated he would normally enjoy. It has been held over and over again that a temporary interruption of the tenant's use and occupation does not affect the covenants or the chattel interest. The rule may be different, it seems, in Scotland: see *Tay Salmon Fisheries Co., Ld.* v. *Speedie* (1) and *Mackeson* v. *Boyd* (2). But the Scotch authorities afford no analogy applicable to English law, because they proceed, it seems, on a different view of the contract and of the legal background. In England, since *Paradine* v. *Jane* (3) and earlier, the law has been that in general the tenant's covenant to pay rent or repair or deliver up in repair are not affected by casualties which interfere with his enjoyment of the demised land. The lessor as a general rule gives no warranty in these respects in favour of the tenant. The tenant must perform his covenants even though the demised house is destroyed by fire (*Monk* v. *Cooper* (4)), quite irrespective of what covenants as to repairs there may be (*Lofft* v. *Dennis* (5)), or whether the loss of enjoyment is due to the landlord's failure to fulfil his obligation to repair (*Hart* v. *Rogers* (6)). In that latter case the tenant would have his cross-claim against the landlord for damages. On the same principle it has been held that a covenant in a mining lease to raise and pay for a certain amount of coal is not affected if it turns out that the mine was so exhausted that there were not coals left in it (*Bute* v. *Thompson* (7)). These and many similar authorities show that by English law the lessee's covenants are generally absolute. The enjoyment and the covenant do not generally march together. I think Lord Buckmaster's judgment proceeds on this basis. He does not put it on the circumstances that the lease also creates an estate in land. But though the lessee's covenants are generally absolute, there are qualifications which the law implies in relief of the lessee, even in the absence of express terms. In other words, covenants in the lease may be suspended or terminated by operation of law and the court will decree accordingly. Thus the covenant to pay rent may be suspended: for instance, if the lessor himself evicts the tenant, as Lord

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(1) 1929 S. C. 593.
(2) 1942 S. C. 56.
(3) Aleyn 26
(4) (1727) 2 Stra. 763.
(5) (1859) 1 E. & E. 474.
(6) [1916] 1 K. B 646.
(7) (1844) 13 M. & W. 487.

Buckmaster observed in *Matthey's* case (1), or if there is eviction by title paramount, a term to be narrowly construed, as Lord Buckmaster points out. The law has also implied a term that a lease may be forfeited if the lessee by matter of record or the like disclaims the lessor's title. Such a case was discussed in *Doe d. Graves and Downe* v. *Wells and Trowbridge* (2). These results all flow from the general nature of the contract as understood in English law and its application to particular conditions of fact. I do not find that they depend on the circumstance that the lease involves a tenure and creates an estate in land. If the contract is avoided or dissolved, as it may be by either party, under the express terms of the lease, the estate in land falls with it. I do not see why this may not be also true if the lease were dissolved by operation of law. Lord Buckmaster does not mention this aspect, though *Whitehall Court, Ld.* v. *Ettlinger* (3) was cited in argument (4) and is referred to by Lord Atkinson in his opinion (5). Lord Buckmaster deals particularly (6) with *Baily* v. *de Crespigny* (7). In that case a lessee claimed damages from his lessor for breach of his covenant not to permit building on a paddock facing the demised premises. The paddock was compulsorily taken by a railway company, which erected buildings on it, including a urinal, thus impairing the amenities of the dwelling. It was held by a strong Court of Queen's Bench that the lessee could not recover. Hannen J., who delivered the judgment of the court held (8) that the lessor was "discharged on the principle expressed in the maxim 'lex "'non cogit ad impossibilia'." The court said (9) that if the position had been reversed and it was the lessee who had covenanted and was being sued for breach of covenant, he would equally have been discharged from the covenant by the change of law, on the principle laid down in *Brewster* v. *Kitchell* (10). This comes very near to the idea of frustration at least if the performance of the covenant is fundamental to the lease and so do the words of Hannen J. (8) which Lord Buckmaster quotes (11) with approval, though he seems to put the decision on the narrower ground that the word

(1) [1922] 2 A. C. 180, 227.
(2) (1839) 10 A. & E. 427.
(3) [1920] 1 K. B. 680.
(4) [1922] 2 A. C. 180, 222.
(5) Ibid. 237.
(6) Ibid. 227.
(7) L. R. 4 Q. B. 180.
(8) Ibid. 185.
(9) Ibid. 188.
(10) 1 Salk. 198.
(11) [1922] 2 A. C. 180, 228.

"assigns" as used in the covenant was to be construed in a special and limited sense which did not include compulsory acquisition by a railway company. But I cannot trace in Lord Buckmaster's judgment any suggestion that as a universal rule the doctrine of frustration or some analogous principle could not be applied to a lease, which was enunciated to be the rule by the Court of Appeal. It is true that there is no reported case in which the rule has been applied and that it could be applied only in rare and exceptional cases. But the doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula. I am not therefore prepared to state as a universal principle that it can in no circumstances be applied to a lease. Let me suggest a single instance, which might some day prove to be of not merely theoretical interest. Let me put the case of a building lease for a term of ninety-nine years, and let it be supposed that a public body acting under statutory authority, soon after the lease was executed prohibited building on that site for an indefinite time, the end of which, if it ever came, could not be foreseen. In effect that would be a prohibition total for all practical purposes both in extent and time, which would override and control both lessor and lessee. Would in that event the lessee continue bound to pay under the lease the yearly rent for ninety-nine years, or would the relationship of landlord and tenant be dissolved by operation of law in respect of that site? As a matter of general principle I would say that the lease was avoided and the term came to an end. But I abstain from further discussion of the point. I agree with the opinion which my noble and learned friend the Lord Chancellor has just delivered. I would dismiss the appeal.

Lord Porter. My Lords, the appellants relied upon the facts which have been stated by your Lordships in order to establish their contention that the agreement between the parties in relation to the fourteen sites had been frustrated and the tenancy had been determined so far as those sites were concerned. Both courts below rejected their contention broadly on the ground that the doctrine of frustration does not apply to a lease. Indeed Asquith J. indicated that if it did apply he would have found frustration in the present case. It is natural therefore that in their case as presented to your Lordships the appellants should state that the question raised by the appeal is whether the doctrine of frustration applies to a lease. That question no doubt is an interesting and difficult one, but it does not necessarily arise in the case now before the House. A narrower question may well be all that your Lordships have to determine, viz. :—whether the rent claimed to be due under the lease of May 12, 1936, is owed by the appellants to the respondents. To defeat this claim the only answer presented to your Lordships was that the lease or the agreements contained in it had been frustrated. The exact question for your Lordships therefore is not does the doctrine of frustration apply to leases generally, but in the circumstances has this lease been frustrated ?

It was conceded on behalf of the appellants that the cases in which a lease can be frustrated are rare and exceptional. A lease is more than a contract. It has long been recognized as creating an estate in land and by statute is enacted to do so : see Law of Property Act, 1925, ss. 1, sub-s. 1 and 205, sub-s. 1 (xxvii.). Moreover the rent is payable for the site and issues out of the land. In these circumstances it obviously is not easy to visualize conditions in which the doctrine of frustration would apply. The land in some form is there and the payment of rent is not prohibited. Some terms of the tenancy may be impossible of performance at least for the time being but the tenancy itself is not thereby necessarily determined. Its basis still exists. Building may not be feasible, yet I do not think the tenancy has come to an end for that reason. But exceptional circumstances might conceivably arise which could be plausibly put forward as a cause of frustration and until it is necessary to pronounce definitely one way or the other I prefer to reserve the point. What I think is clear and I believe all your Lordships agree is that the lease now in question has not been frustrated by the inability of the tenants in the circumstances now existing to use the land for the purpose which both parties contemplated, viz. :—the building of shops. The lease is a long one and the interruption comparatively short. Moreover the obligation to pay rent is not dependent upon the appellant's ability to erect or upon the actual erection of shops. It is payable from a date to be ascertained from the landlords' notice that erection may proceed. If frustration can apply the fact that there are in the contract provisions dealing with the circumstances said to cause frustration is not necessarily fatal to the application of the doctrine. That circumstance is only one element to be considered. In the present case there is, it is true, a clause temporarily excusing for a time the obligation to build, but it is noteworthy that this abeyance clause, as it is called, though it excuses immediate building does not do away with the obligation to pay rent during the period of abeyance. In such circumstances I can see no reason for invoking the doctrine of frustration. The basis of the contract is not gone and if the theory of an implied term be relied on, I cannot think that a lessor, however reasonable, must be considered to have contracted on the basis that the tenancy would come to an end in case the building of shops became impossible for a number of years. I agree with the opinion of the Lord Chancellor and, agreeing with it, am of opinion that the appeal should be dismissed.

LORD GODDARD (read by LORD PORTER). My Lords, Asquith J., who tried this case, decided in favour of the respondents on the ground that the doctrine of law usually called frustration does not apply to a lease, and that this was as true of a building lease as of any other. But earlier in his judgment he said that had the doctrine applied he would have decided that the contract, by which he must have meant the lease, had been discharged. The Court of Appeal agreed with him that the doctrine did not apply to a lease, but, as I read their judgment, they also held that in any case it could not be said that this particular lease was discharged, thereby differing from the learned judge. I agree with the Court of Appeal on both points. We are obliged, as were both courts below, to deal with the case simply on the admission, embodied in the order made by the Judge in Chambers, that the restrictions placed by the Government upon building and materials made it impossible to erect shops on any of the sites not already built on or to continue their development. No reliance was placed on the other admissions contained in the order. Obviously the restrictions referred to are those imposed by orders made under the Defence Regulations which have effect only for the period of the present emergency, though how long that will continue no one can say. On that one fact it is impossible to say, supposing the doctrine to be applicable to a lease, that one for ninety-nine years had been frustrated. Even if the restrictions remain in force for ten years that is a very small part of the life of this lease. Moreover the rent is reserved in respect of sites, not shops, and begins twelve months after notice is given that building may proceed on any site, although by reason of what the lease calls an abeyance period the tenant may not be obliged to build within that period and may not do so. This abeyance period might quite conceivably last for a considerable time, if there were no demand for shops, but the rent would none the less be payable. If however the tenants came under an obligation to build, but were prevented from so doing by the orders, they would furnish them with a good defence, were they sued for breach of their covenant to build, but not to a claim for rent under this lease. But I think it right to say that I agree also with the Court of Appeal on the wider question. There is no doubt I think that the opinion prevails generally in the profession that the doctrine in question does not apply to a lease, and if there is any doubt on the subject I venture to think that it is desirable in the interests of lessors, lessees, and their advisers that it should be resolved. I agree with the opinion of my noble and learned friend Lord Russell of Killowen, which I have had the advantage of reading, but as the matter is of obvious importance and interest I will shortly state my own reasons. The reason why the doctrine does not apply was first stated by Lush J. during the last war in *London & Northern Estates Co.* v. *Schlesinger* (1), and was that the lease creates a term of years which is vested in the tenant. I cannot but think that this principle was accepted by this House in *Matthey* v. *Curling* (2). In that case a house let on lease had been requisitioned by the War Office who remained in possession till the end of the term. Among other arguments it was contended that performance by the lessee of his covenants was thereby rendered impossible and was excused, it being an implied condition that the lessee should be allowed to continue in possession and enjoyment of the premises. Dealing with this contention Lord Buckmaster said (3): " There is " no question here of performance having become impossible " owing to its prohibition by statute, for no law has prohibited " performance though enjoyment of the premises has been " interfered with by legal powers." Lord Sumner and Lord Carson agreed with his opinion, and none of them expressed any dissent from Lord Atkinson who expressly approved the decision in *Whitehall Court, Ld.* v. *Ettlinger* (4), which in turn had approved the opinion of Lush J. It is now sought to apply this doctrine of frustration to a lease because circumstances have arisen, and restrictions have been imposed, which while not divesting the tenant of his interest do prevent

(1) [1916] 1 K. B. 20, 24.

(2) [1922] 2 A. C. 180.

(3) [1922] 2 A. C. 180, 230.

(4) [1920] 1 K. B. 680.

him from putting the land to the use intended both by him and the landlord. Now whatever be the true ground on which the doctrine is based it is certain that it applies only where the foundation of the contract is destroyed so that performance or further performance is no longer possible. In the case of a lease the foundation of the agreement in my opinion is that the landlord parts with his interest in the demised property for a term of years, which thereupon becomes vested in the tenant, in return for a rent. So long as the interest remains in the tenant there is no frustration though particular use may be prevented. There can also be no doubt that if there be frustration the contract is destroyed so that both parties are released from its bonds. If then this doctrine applies to a lease some strange and unjust results would follow, though to use the well-known words of Lord Sumner the doctrine is " a device by " which the rules as to absolute contracts are reconciled with " a special exception which justice demands " (*Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (1).) In the present case if some shops had been built on the blue land and the lease were held to be frustrated the landlords could presumably repossess themselves of the land with the buildings on it for which they would have to pay nothing. If the lease were now to be regarded as at an end the tenants would have no title, however willing they might be to continue to pay rent and resume building when the orders ceased to have effect. And what would then be the position of those to whom the shops had been sub-let or of mortgagees from whom finance for the building had been obtained ? It is no doubt easy to envisage a hard case ; building lessees may find soon after a lease has been granted that a statute is passed prohibiting building on the land in perpetuity, and if the legislature should not see fit to provide for compensation or to make provision for what is to happen to leases in such cases hardship would result, but no greater than if they had purchased the fee simple of a building estate which subsequent legislation prevented them from developing. In either case it is not the estate in the land which is affected, but the use to which it can be put. In my opinion the Court of Appeal was right on both grounds and I would dismiss the appeal

Appeal dismissed.

Solicitors for appellants : *Langford, Borrowdale & Thain.*
Solicitors for respondents : *Leslie Freeman & Co.*

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(1) [1926] A. C. 497, 510.

[HOUSE OF LORDS.]

H. L. (E.)*

1944

Nov. 15, 16, 17, 20.

1945

Feb. 9.

LARRINAGA STEAMSHIP COMPANY, LIMITED . . . . . APPELLANTS;

AND

THE KING . . . . . . RESPONDENT.

Insurance (marine)—Requisition—Charterparty T. 99A*—War risks—War-like operations—Outward voyage of ship with munitions—Return voyage without cargo—Stranding on return voyage—Obedience to orders of charterer.*

On the outbreak of war a ship was requisitioned under the charterparty known as T. 99A which provided: "The master " . . . . although appointed by the owners . . . . shall be under " the orders and direction of the charterer as regards employ- " ment, agency, or other arrangements." Certain risks, including consequences of "war-like operations," were taken by the Crown. The ship, having conveyed a cargo of war material to a French port, was under orders to return to an English port without cargo, for release from requisition. The Sea Transport Officer at the French port ordered her to leave as soon as her cargo was discharged and proceed to a point where she was to await convoy to England. The master protested against the order because of the bad weather but his objection was overruled and after leaving the port the ship stranded:—

Held, (1.) that the ship at the time of the stranding was not engaged in "war-like operations" nor was the stranding the consequence of "war-like operations"; (2.) that, though "employment" in the charterparty covered employment of the ship, the stranding was not the consequence of the orders to proceed from the French to the English port; (3.) that, even if the order of the Sea Transport Officer was the cause of the stranding, it was a naval order and not an order of the charterer; and therefore that the charterer was not liable for the damage.

Decision of the Court of Appeal [1944] K. B. 124, affirmed.

Appeal from the Court of Appeal.

The facts stated by Viscount Simon L.C. and Lord Porter were as follows: Upon the outbreak of war in 1939 the steamship *Ramon de Larrinaga,* which belonged to the appellants, was requisitioned by the Crown on the terms contained in the time charterparty T. 99A, incorporating T. 773. It was provided that certain risks of war, including "the consequences " of hostilities or warlike operations" were to be taken by the Crown. By cl. 1: "The owners agree to let, and the charterer

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* *Present:* Viscount Simon L.C., Lord Thankerton, Lord Wright, Lord Porter and Lord Goddard.

"agrees to hire the ship for such period as the charterer may "require . . . . to be employed in such lawful trades between "good and safe ports or places as the charterer or his representa- "tive shall direct." By cl. 3: "The charterer shall . . . . "be liable for all expenses reasonably incurred by the owners "for the purpose of complying with the directions of the "charterer as to placing the vessel at his disposal at the port of "delivery. While the vessel is on pay the charterer shall be "liable for all fuel . . . . reasonable ballast . . . . water ". . . . for stevedoring, pilotage, port charges, light, dock, "canal and other dues, and, where incurred for charterer's "business, for customary tug assistance, boating, agencies and "commissions. The owners shall arrange where necessary for "these services and pay for them as if they were trading on "their own account, and shall be reimbursed by the charterer ". . . ." By cl. 9: "The master shall prosecute his voyages "with the utmost dispatch and shall render all possible "assistance with ship's officers and crew and boats, cranes, "derricks and winches on board, and although appointed by "the owners, he shall be under the orders and direction of the "charterer as regards employment, agency or other arrange- "ments: and the charterer hereby agrees to indemnify the "owners for all consequences or liabilities that may arise "from the master or officers signing bills of lading or other "documents or complying with such orders as well as from "any irregularity consequent thereon in the ship's papers. "The charterers shall not be held responsible for loss or damage "sustained by the owners through the negligence of pilots, "masters, officers or crews of tug-boats, stevedores or other "qualified persons employed by the charterer in the loading, "stowage or discharge of the cargo." By cl. 11: "The "charterer or his representative shall furnish the master "from time to time with all requisite instructions and "sailing directions in writing . . . ." On September 5, 1939, the appellants were notified that the ship would be loaded with war stores. On September 14 she was ordered to Newport, where she took on board mechanical transport for military use and proceeded with that cargo to Nantes, which was then a British war base. After discharging her cargo, she returned to Quiberon Bay and thence to Newport, where she loaded a similar cargo, but this time was ordered to St. Nazaire, also a British war base. Whilst she was being loaded the appellants were notified by the charterer on October 7 that after that voyage she would return to Newport, later changed to Cardiff, for a joint survey, as she was being released from government service. She reached St. Nazaire on October 11 and completed her discharge on October 13 at 4 p.m. On the latter date the master was taken ill and the first officer assumed his duties, and on that same day he received written orders from the Sea Transport Officer at St. Nazaire that he was to proceed to Quiberon Bay under French naval guidance after discharge was completed, with a view to forming part of a convoy about to be escorted to the Bristol Channel. Later on, at about 5 p.m., he had a personal interview with the Sea Transport Officer. When this interview took place the weather was bad; it was raining, with a blustering wind, and the glass was falling. In these circumstances the chief officer thought it dangerous to proceed, especially as he knew that it would be very dark, that the approach to St. Nazaire is difficult, that there are many dangerous banks and poor anchorages, and the leading lights of the port were not in use. He accordingly protested against the order and said that he wished to stay in port that night and to sail next morning. His objections, however, were overridden by the Sea Transport Officer, who told him that he must leave as soon as discharge was complete, since the berth was wanted for another ship. As a result of these instructions, when discharge was completed the ship started on her voyage at about 6 p.m. and proceeded down channel in charge of a pilot, pilotage being compulsory down the channel and outside. At 1.10 a.m. on October 14 it was blowing a gale and very squally, and, visibility being poor, the pilot advised anchoring. The ship was accordingly anchored at a place advised by him. While she was there the weather got worse, great strain was put upon the cable and the main engine was started to relieve it. The pilot then advised that she should put back to St. Nazaire, and the anchor was hove up, but the cable broke in the process and the ship drifted on to a sand bank known as the Petit Charpentier Bank, and pounded heavily until about 3 or 4 a.m. when she got clear with the help of the rising tide. Eventually she reached her original berth, but had received serious damage, which it was agreed required an expenditure of 41,978*l.* 3*s.* 4*d.* to repair. The appellants, in their petition of right, claimed that the cost of repair should be borne by the Crown on two grounds, first, because they alleged that the grounding and damage were "a consequence of a warlike operation," and secondly, because they "resulted from the master complying "with the instructions and orders of the Sea Transport Officer." Atkinson J., before whom the trial took place, decided the first point in favour of the Crown, holding that the vessel was not at the material time engaged on a warlike operation. He decided the second point in favour of the appellants, holding that the order given to the ship at St. Nazaire, under which she proceeded to Quiberon Bay, was an order relating to "employment" within the meaning of cl. 9 of the charterparty. The Crown appealed to the Court of Appeal (Lord Greene M.R., MacKinnon and du Parcq L.JJ.) and MacKinnon L.J. delivered the unanimous judgment of that court that the present appellants failed on both points. The appellants appealed to the House of Lords.

Sellers K.C. and *Owen Bateson* for the appellants. The ship at the time of the stranding was concerned in a very distinctive warlike operation. The shipping for moving the expeditionary force was taking an essential part in the military operation. The merchant vessels concerned were for the time being a military fleet, an essential part of the vehicles of the army. This ship had had on board on the outward voyage mechanical equipment for the army but that was not essential for her participation in the military operation; she might have been a stand-by vessel and empty. To be engaged in a military operation does not necessarily involve making an active contribution towards it. This ship began to be engaged in a military operation when she began to load her first cargo and she was still so engaged at the time of the stranding, for the return journey was part and parcel of one military operation. It would be artificial to make any distinction between her return from St. Nazaire and her previous return from Nantes. On land if a lorry takes munitions up to the front line, it is still taking part in a military operation on its return journey, even though it has been unloaded. So in the case of a ship the discharge of the cargo does not terminate the military operation, which is not concluded when the last lorry or the last gun is put over the rail. The movement of vehicles is as much part of the military operation as the movement of stores and troops. This ship was in danger coming back as well as going out. If in the Normandy landing a tug, having taken out part of the concrete harbour, had afterwards been told to go to a neighbouring anchorage to await return, and had been driven ashore there by a storm, the damage would have been attributable to a warlike operation.

Ships going out to bring home survivors from Dunkirk were engaged on a warlike operation not only when the men had come on board but during the voyage out. A ship which got there and found there were no further troops to evacuate would have been engaged on a warlike operation. This ship was performing a round trip and the warlike operation was not concluded till she got back to the British port. If she had been stranded on the Welsh coast when approaching Cardiff the legal position would have been the same. Even after hostilities have ceased a ship may still be engaged on a warlike operation : *Hain Steamship Co., Ld.* v. *Board of Trade* (1) ; *Board of Trade* v. *Hain Steamship Co., Ld.* (2). The ship having been engaged in a military operation at the time of the stranding this case is similar to *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (3). The circumstances in which the ship was forced out of port by order of the Sea Transport Officer, despite the protests of the acting master, indicate that the sailing was part of a warlike operation, since otherwise she would have remained. The port was controlled by the navy and it was essential to get the empty ships away in order to get the fully-loaded ships in. The damage caused by the bad weather into which the ship was forced is as much the result of a warlike operation as if she had been torpedoed. This would be true even if she had not been requisitioned. *J. Wharton (Shipping), Ld.* v. *Mortleman* (4) is distinguishable on the facts. [They referred to *British and Foreign Steamship Co., Ld.* v. *The King* (5) ; *Britain Steamship Co., Ld.* v. *The King* (6) ; *Atlantic Transport Co.* v. *Director of Transports* (7) ; *In re Peninsular and Oriental Branch Service and Commonwealth Shipping Representative* (8) ; *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (9).] Apart from the question whether the stranding resulted from a warlike operation, it resulted from an order as to "employment" within cl. 9 of the charterparty. "Employment" means employment of the ship and the clause covers every order of the Government to the ship, but to bring the indemnity into operation the order in question must be the proximate cause of the accident. In the circumstances in

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(1) [1928] 2 K. B. 534, 544.
(2) [1929] A. C. 534.
(3) [1942] A. C. 691, 712.
(4) [1941] 1 K. B. 340, 342; [1941] 2 K. B. 283.
(5) [1918] 2 K. B. 879, 882.
(6) [1921] 1 A. C. 99, 108, 109 114, 116.
(7) (1921) 38 T. L. R. 160.
(8) [1922] 1 K. B. 706, 709.
(9) [1923] A. C. 191, 198, 204.

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which it was given the order to leave St. Nazaire was such an order. It was an order of the charterer. The analogy used by Atkinson J. of the servant who is injured while going an errand during an air raid fits this case. The judge's findings on this point are very strong. [They referred to *Lensen Shipping Co., Ld.* v. *Anglo-Soviet (Shipping) Co., Ld.* (1); *Liverpool Steamship Co., Ld.* v. *Liverpool and Glasgow Salvage Association* (2); and Scrutton on Charterparties, 14th ed., p. 47.]

VISCOUNT SIMON L.C. intimated that the House did not require to hear argument on behalf of the Crown on the point whether the ship was damaged in consequence of a warlike operation.

Sir Donald Somervell A.-G. and *Devlin* for the Crown. It is conceded that " employment " in cl. 9 means employment of the ship, but having regard to the charterparty as a whole it refers to a limited kind of employment. It should be regarded as a residuary clause. Loss or damage due to deviation or change of voyage on the instructions of the charterers after bills of lading have been signed is the class of order contemplated by the clause. In any event the charterer cannot be liable to indemnify the owners in respect of losses for which provision is made elsewhere in the charterparty, i.e., damage caused by marine or war risks. The popular meaning of " consequences " is too wide to be attributed to it, as used in cl. 9. If a marine risk, incurred as a result of the order to sail to Quiberon Bay, were taken to be within the clause, even though carried out by the master in his own time and according to his own judgment, it would render the charterers liable for every marine risk. In this case the stranding was the consequence of a marine risk. Though an order specifying the voyage to be performed is an order as to " employment," yet an order as to the time of sailing, which is an order as to navigation, is not: see *Weir* v. *Union Steamship Co., Ld.* (3). Navigation is the responsibility of the master. But even if it were conceded that orders to sail in a storm are such orders as may render the charterer liable for an indemnity, they must also be orders of the charterers as charterer and such as it is agreed he is entitled to give. The order in the present case was not an order of the charterer but a naval order, an order which had to be obeyed at whatever risk, which is not the case with other orders. Accordingly, the order was not one within cl. 9. In any event the stranding was not caused by the order nor by sailing in obedience to it. Stranding on a sandbank is not the direct " consequence " of going to see in difficult weather just as striking an iceberg is not a consequence of obeying an order to cross the Atlantic, though other considerations might apply if the order was to sail to the North Pole. [They referred to *Kruger & Co., Ld.* v. *Moel Tryvan Ship Co., Ld.* (1); *Lensen Shipping Co., Ld.* v. *Anglo-Soviet (Shipping) Co., Ld.* (2); *Liverpool Steamship Co., Ld.* v. *Liverpool and Glasgow Salvage Association* (3).]

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(1) (1935) 40 Com. Cas. 320.
(2) (1929) 34 Ll. L. Rep. 459.
(3) [1900] A. C. 525, 533.

Sellers K.C. in reply. Both the written and the oral orders to sail at once for Quiberon Bay were given by the Sea Transport Officer in the capacity of representative of the charterer. In the ordinary case of a charterer ordering a ship on a voyage in the course of which it stranded there would be no question of anything but a marine risk. But if a charterer for his own purposes ordered a ship to go by a particular route (e.g., through a minefield) damage would be a consequence of the order. Every order to a ship is an order within cl. 9, but every accident is not a consequence of the order within the clause.

The House took time for consideration.

Feb. 9, 1945. VISCOUNT SIMON L.C. My Lords, on the first question, I agree entirely with the conclusion unanimously reached in both courts below that the proximate cause of the stranding of the ship was not " warlike operations." There is nothing in the large body of decisions applying the relevant paragraph in charterparty T. 99 or T. 99A to particular instances of damage to requisitioned ships which would justify the view that this stranding was the " consequence of warlike " operations." In *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport (The Coxwold)* (4), which is the most recent case in this House on the subject the *Coxwold* was admittedly engaged in warlike operations (carrying from one war-base to another military stores for the use of British forces in the field) and the question was whether her stranding was proximately caused by warlike operations. Here the *Ramon de Larrinaga* was not engaged in warlike operations at all. Mr. Sellers frankly admitted that his case would be the same if the ship had stranded off the Welsh Coast while approaching

(1) [1907] A. C. 272.
(2) 40 Com. Cas. 320.
(3) 34 Ll. L. Rep. 459.
(4) [1942] A. C. 691.

Cardiff. She was attempting to make a voyage without cargo from St. Nazaire to Cardiff and suffered from a marine peril while doing so. The fact that she was ordered by the Sea Transport Officer to leave port sooner than her acting master thought wise cannot turn her disaster into the consequence of a warlike operation. The " proximate " or " determining " cause was a misfortune in navigation, not attributable to any warlike operation at all.

On the second question which arises under cl. 9 of the charterparty, I agree with the conclusion reached in the Court of Appeal, though not with the course of reasoning by which it was reached. MacKinnon L.J., in giving the judgment of the court, held that the word " employment " in the part of cl. 9 which speaks of " employment, agency or other arrangements " did not refer to " the employment of the ship " pursuant to cl. 1 and cl. 11. He held that " employment " in cl. 9 meant employment of persons. The lord justice speaks with such a width of experience and knowledge on the construction of this sort of document that I greatly hesitate to differ from him, but it seems to me very difficult to accept this interpretation, in view of the use of the word " employment " in the earlier clause. Indeed, before this House, the respondent's counsel conceded that " employment " in cl. 9 did mean employment of the ship, but argued that, having regard to the charterparty as a whole, it referred only to a limited kind of employment. I have had the advantage of studying my noble and learned friend Lord Porter's opinion, in which he discusses this question in detail, and I agree with his view of the matter. Even if it were conceded that the order to proceed from St. Nazaire to Cardiff is within the words " orders and direction of the charterer as " regards employment," it still remains true that the stranding of the vessel was not a consequence arising from such an order. It was only an incident which arose in the course of carrying out the order. The appellants argue that the oral order to leave the port as soon as the discharge was finished is more closely connected as a cause with the result of the stranding. Even so, the connexion does not seem to me sufficiently close, and, in any event, that order was not the charterer's order, but an order given by the Sea Transport Officer at St. Nazaire. I move that this appeal be dismissed.

LORD THANKERTON. My Lords, I agree with the opinion of my noble and learned friend. I also have had the opportunity of considering the opinion about to be delivered by my noble and learned friend Lord Porter, and as I agree with it in every particular I am content to express my complete concurrence in it.

LORD WRIGHT. My Lords, I have had the advantage of reading in print the opinions prepared by my noble and learned friends, the Lord Chancellor and Lord Porter. As I agree with them, I merely add a few observations on the important question of principle which is raised by the appellants' claim to an indemnity under cl. 9 of the charterparty. I find myself with all deference unable to take the same view as in the Court of Appeal MacKinnon L.J. took, and out of respect to his authority I think I ought to state briefly, in my own words, my reasons for differing from him. The central point of contest is what is meant by the words " employment, agency and other " arrangements " occurring as they do in cl. 9. The opposed views are, on the one hand, that they mean " employment of " the ship " or, on the other hand, that they mean " employ- " ment of persons, stevedores, agents, pilots, tug owners or " other persons." To my mind the former is the sense in which the " employment " is used in this context. It couples up with the words " to be employed in such lawful trades " in cl. 1. It also fits in with the words " agency or other " arrangements " with which it is directly associated. All three words have a reference to the general management of the ship's business and affairs under the charterparty. " Employ- " ment " means employment of the ship to carry out the purposes for which the charterers wish to use her ; " agency " deals with another aspect of the conduct of the ship's affairs. The shipowner is entitled in the ordinary course to decide to what firm or person in each port the ship in the course of the charterparty is to be consigned as agent. The selection is here left to the charterers. That is an important matter because of the multifarious duties and responsibilities which may fall to be discharged according to mercantile law by the ship's agents. " Arrangements " is a wider term. It is also used in this charterparty in cl. 3. There it refers to disbursements which have to be made for services in connexion with operating the ship, and I think it has a similar scope in cl. 9. In this way the three words in question have a kindred significance and are used as referring to the general conduct of the business of the ship under the charterparty, while the " employment of "persons" would introduce a different and incongruous element. It is true that lower down in cl. 9, in a separate paragraph, there are the words "other qualified persons" employed by the charterers. But there the ambit of the word "employed" is clearly limited and defined by the word "persons." It is a different matter when it is used simpliciter in the first paragraph of the clause, in a context in which prima facie the employment of persons is alien. Such authority as there is goes to support the view that "employment" means "of the ship." In *Weir* v. *Union Steamship Co., Ld.* (1), Lord Davey has some observations on a somewhat similar clause in the charterparty there in question, but he seems to assume that the words referred to the vessel's employment, which he distinguished from any incident of navigation. The other Law Lords do not refer to the clause which in that charterparty was numbered cl. 4. Since then two very experienced commercial judges have accepted the construction that "employment" meant employment of the ship. Greer L.J. in *Lensen Shipping Co., Ld.* v. *Anglo-Soviet Shipping Co., Ld.* (2) and Roche J. in *Portsmouth Steamship Co., Ld.* v. *Liverpool and Glasgow Salvage Association* (3). What they say does at least indicate how it struck them that the word in the context should be construed.

In my opinion the "employment" referred to is "employment of the ship." This opinion, based on the words, seems to me to be confirmed by looking at the structure and scheme of the charterparty as a whole. But I can best consider that when I have indicated what is, I think, meant by "orders and direction of the charterer as regards employment" of the ship. Atkinson J. (4) seems to have thought that it included what he described as "sailing orders to Quiberon Bay to be obeyed forthwith in the dark and in bad weather with a falling glass and insisted upon after protest." He accordingly gave an enlarged scope to the indemnity. But I think the word "employment" in cl. 9 has the same meaning as in cl. 1, and means the services which the ship is ordered to perform, such as the voyages to or from particular ports, with particular cargoes or in ballast. In this particular case the order as to employment was the order to go to Cardiff for the off-survey. The order to go to Cardiff for the off-survey was, in my opinion, an order as to employment within cl. 9 of the charterparty. No point is made in regard

(1) [1900] A. C. 525, 532, 533.
(2) 40 Com. Cas. 320, 329.
(3) 34 Ll. L. Rep. 459.
(4) (1943) 168 L. T. 203, 205.

to the directions in writing given under cl. 11. They were at once properly destroyed and their exact tenor is not clear. The view of the judge was that what he described as the " sailing " orders to Quiberon Bay to be obeyed forthwith " (I have already quoted his words), were orders as to employment within cl. 9. With the greatest respect, I cannot agree with that view. These sailing orders which the judge found were given were, in my opinion, merely dealing with matters of navigation, in regard to carrying out the orders to proceed to Cardiff. It was the duty of the master to exercise his judgment in such matters of navigation. The master was the servant of the shipowner. Lord Davey in *Weir* v. *Union Steamship Co., Ld.* (1) was of opinion that the clause he was considering had " nothing whatever to do with navigation or " any incident of navigation." That is even more obvious when the general scheme of the charterparty now in question is considered. Not only is the charterparty not a demise, but the shipowner is expressly made liable inter alia for all services in connexion with the navigation of the ship. Under the later paragraphs of cl. 9 the charterers are not to be held responsible for damage caused by the negligence of masters, officers or crews, and the owners are not relieved from responsibility for safe and proper stowage. The whole scheme of the charterparty was to place liability for sea perils on the shipowners who were to be responsible for insurance, other than that for war risks. The appellants did not, in fact, insure against marine risks, but the position must be considered as if they had, and if they had, the judgment of Atkinson J. would have had the result that the marine underwriters, on paying the loss caused by the stranding, would have been entitled by subrogation to pass the loss on to the charterers, who would thus have been compelled to bear a marine loss of a type which was never intended, according to the plain meaning of the contract, to fall on them. Further, if the indemnity in cl. 9 applies in this case, it must be because the loss was a consequence of the ship complying with an order or direction as to the employment of the ship. It would follow on that view that generally every marine casualty which affects the ship when sailing under charterers' orders would be a consequence of her employment and of the orders or directions of the charterers under cl. 9. I cannot accept this conclusion. In this aspect the peculiar features of the case, such as the objections of the master, are not

(1) [1900] A. C. 525, 533.

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material. The strange results which would follow from the decision of Atkinson J. would, it is true, be avoided by the construction adopted by the Court of Appeal, but I am unable to adopt that construction. The construction which I adopt gives, I think, a natural meaning to the words of the charterparty and does not involve a departure from its business scheme. I have not thought it necessary to consider whether the orders on which the judge based his judgment were or were not given by the Sea Transport Officer in his capacity as harbour master or port official. Indeed, the evidence on this point is insufficient. I concur in the motion proposed.

LORD PORTER (read by LORD SIMONDS). My Lords, this appeal calls for a decision upon two separate questions, the first involving a reconsideration of the many cases dealing with the difference between war and marine risks, and the second requiring the consideration of a well-known clause in time charterparties by the terms of which the master is placed under the orders and direction of the charterers, as regards employment, agency or other arrangements, an dthe charterers give the owners an indemnity against the consequences of complying with those orders. On the facts Atkinson J. and the Court of Appeal alike held the loss to have been incurred by marine risk, and I understand that all your Lordships agree with this finding. No question of general principle is at stake. There is abundance of authority in your Lordships' House that a ship engaged in carrying war stores from one war base to another, or indeed in carrying war stores to a war base, is engaged on the warlike operation of proceeding through the water to her appointed discharging port. For this proposition it is sufficient to cite the authorities referred to in *Yorkshire Dale Steamship Co., Ld.* v. *Minister of War Transport* (*The Coxwold*) (1). While then, the *Ramon de Larrinaga* was proceeding to Nantes or to St. Nazaire laden with war stores she was engaged in a warlike operation, and a loss consequent upon so proceeding would be a war loss. But that is not the position in which the damage occurred. The vessel had completed her discharge and was on her way to undergo her off-survey with a view to terminating the requisition and charter. None of the decided cases has gone so far as to declare such a voyage a warlike operation, nor do the principles upon which they were decided require any such result.

(1) [1942] A. C. 691.

It was sought to support the appellants' argument by speaking of a round voyage, or a voyage out and home, as being part of the same operation, and contending that the whole voyage must be included amongst warlike operations if part was of that character. Further, it was said that if the argument were rejected the curious result would follow that a voyage out to Dunkirk to fetch home surviving combatants would be a warlike operation, not on the outward voyage but only after the homeward voyage was begun, and not even then if it was found that there were no further troops to evacuate. My Lords, the error in the general argument consists, I think, in looking upon a round voyage, or a voyage out and home, as necessarily partaking of the same character throughout. This is not so; indeed, the appellants were constrained to admit that if the *Ramon de Larrinaga*, instead of being sent home in ballast, had been sent on a commercial voyage, she would have ceased to be carrying out a warlike operation, yet in being so occupied she might be proceeding on some portion of the round voyage or on the homeward part of a voyage out and home. For the purpose of the contractual relations between owners and charterers an agreement to perform a round voyage or a voyage out and home differs from an agreement to perform a single voyage, but for the purpose of ascertaining whether on a particular portion of the voyage the adventure upon which the ship is engaged is warlike or peaceful, the difference is immaterial. A voyage in ballast to a home port for the purpose of an off-survey is clearly not a warlike operation, and none the more so though the vessel engaged was performing a warlike operation on her voyage out. Nor does the example of *Board of Trade* v. *Hain Steamship Co., Ld.* (1), assist the appellants. In that case it is true that the *Roanoke* was held to be engaged on a warlike operation though she was proceeding from England to the United States of America. She was, however, not only a warship of the United States Navy, but was carrying mines back from Europe to America, and the war had not ended though the armistice was already in being. My Lords, for the purposes of this case it is not necessary to determine whether a vessel sent to a port for the purpose of performing a warlike operation and for that purpose only is engaged on such an operation on her outward voyage. *J. Wharton (Shipping), Ld.* v. *Mortleman (The Alderpool)* (2), which touched on this topic, was not free from complications, and I prefer not to express

(1) [1929] A. C. 534.

(2) [1941] 2 K. B. 283.

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any opinion on it. So, too, even if it were conceded that a voyage to Dunkirk for the purpose of bringing back troops was a warlike operation throughout and continued to be so though the transporting ship arrived too late to bring back any survivors, it would not affect the present case. The *Ramon de Larrinaga* was travelling not for a warlike purpose but for a peaceful one; she had completed her war services and was sailing home to be released. I agree with the conclusion and reasoning of both courts below.

The second question at issue depends on the construction of a clause frequently found in time charterparties. In T. 99A it takes the following form :—" (9.) The master shall prosecute his " voyages with the utmost dispatch and shall render all possible " assistance with ship's officers and crew and boats, cranes, " derricks and winches on board, and although appointed by " the owners, he shall be under the orders and direction of the " charterer as regards employment, agency or other arrange- " ments: and the charterer hereby agrees to indemnify the " owners for all consequences or liabilities that may arise from " the master or officers signing bills of lading or other docu- " ments or complying with such orders as well as from any " irregularity consequent thereon in the ship's papers. The " charterer shall not be held responsible for loss or damage " sustained by the owners through the negligence of pilots, " masters, officers or crews of tug-boats, stevedores or other " qualified persons employed by the charterer in the loading, " stowage or discharge of the cargo." (The argument, as I understood it, derived from this wording, was that the order to leave St. Nazaire and to proceed to Cardiff was an order as regards employment, and that though generally a marine loss following on such an order would not be its consequence, yet where, as here, the order was to proceed in the face of the danger of a storm and against the protests of the master, the damage which the ship suffered was a consequence of the order. Had he not been compelled to leave port the master would not have sailed, and it was, it is said, the natural and a contemplated result of obeying that order that the ship might suffer marine damage: the respondent was therefore under a duty to indemnify the appellants for their loss.)

Atkinson J. accepted the appellants' argument and found in their favour. The Court of Appeal reversed his decision, holding that " employment " in cl. 9 meant employment of persons and not employment of the ship. Before your Lordships'

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House, and indeed throughout the hearing of the case, the respondent conceded and, indeed, maintained that " employ- " ment " in cl. 9 did mean employment of the ship, but a limited employment, not any employment whatsoever. My Lords, (I cannot but think that the word employment in cl. 9 does include at any rate certain employments of the ship) It is so used in cl. 1 of the charterparty and this use does not seem to be qualified by the collocation in which the word is found in the second part of cl. 9. (But though some employment is covered not every kind of employment is comprehended; the word is coupled with " agency and other arrangements " and must be construed with the limitation which its society imposes and having regard to the terms of the charterparty as a whole) The clause is to be found at least as early as the second edition of Carver on Carriage by Sea (1891) when it took this form :—" The master (although appointed by the owners) " shall be under the orders and direction of the charterers as " regards employment, agency or other arrangements : and " the charterers hereby agree to indemnify the owners from all " consequences or liabilities that may arise from the master " signing bills of lading by their orders or those of their " agents. . . . . " The modern clause obviously gives a wider indemnity, but under it the limitation to be put upon " employ- " ment " of the ship has still to be determined. In its natural sense it includes orders to proceed from one port to another or to undertake a voyage or series of voyages, and therefore the original notification of October 7, and the written order of October 13, in so far as it reiterated and confirmed that order, were authorized and covered by the clause. But this order did not in a legal sense, and I doubt if such an order ever could, cause such a loss. Even the order of October 13 specified no exact moment of departure, except that the ship was to sail after the discharge was complete. This wording left it to the master's discretion to sail at a reasonable time thereafter, and in determining what is a reasonable time all such matters as the state of the weather and the exhaustion of the crew would properly be taken into consideration. In these circumstances it cannot be said that either of these orders caused the damage which the ship suffered. A loss is not, under English law, caused by orders to make or by making a voyage because it occurs in the course of it. Such a loss is merely the fortuitous result of the ship being at a particular place at a particular time, and in no legal sense caused by the charterers' choice of

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port to which the ship is directed or their instructions to her master to proceed to it. But it was said that the ship sailed not by reason of the written order to proceed, but by the subsequent oral order, and that such an order did cause the loss, since it was the probable and contemplated result of sailing in unfavourable weather that the ship might suffer damage which, had the master been free to choose his own time, would probably have been avoided.

Three answers to this argument have been made by the respondent. (1.) That though an order specifying the voyage to be performed is an order as to employment, yet an order as to the time of sailing is not. That order, it is contended, is one as to navigation, or, at any rate, not as to employment. My Lords, this distinction seems to me to be justified: an order to sail from port A to port B is in common parlance an order as to employment, but an order that a ship shall sail at a particular time is not an order as to employment because its object is not to direct how the ship shall be employed, but how she shall act in the course of that employment. If the word were held to include every order which affected not the employment itself but any incident arising in the course of it almost every other liability undertaken by the charterer would be otiose, since the owners would be indemnified against almost all losses which the ship would incur in prosecuting her voyages. In particular war and marine risk insurance would be unnecessary, because the charterers would be liable for the losses which were so covered, since the ship would be proceeding on their orders and entitled to an indemnity for all losses caused by following them. This result would be the more remarkable since by cl. 4 of the charterparty, coupled with Part III. (iii.) of Form T. 775 (Tramp Ships), the charterer is in effect to pay the premium for marine risks as part of the hire. Yet according to the appellants' argument the insurers after paying the loss would be subrogated to the rights of the owners and could sue the charterers upon the indemnity under cl. 9 and the charterers must pay that claim to the insurers in addition to finding the premiums upon their policies. It would be a further strange consequence of the wide interpretation contended for, that the first half of cl. 9 should impose a liability for (say) stevedores' acts in cases where the charterers directed the owner what stevedoring firm to employ, whereas the second half should exempt them from liability provided they employed the stevedores direct. The contention that the word bears a limited meaning derives some support from the observations of Lord Davey in *Weir* v. *Union Steamship Co., Ld.* (1), a case in which it was suggested that the charterers were under an obligation to provide any ballast necessitated by their order to the chartered vessel to proceed unladen to the loading port. As part of their argument the owners relied upon a clause in the charterparty similar to cl. 9, T. 99A. Lord Davey rejected this on the ground that the wording, it is true, put the captain under the orders and directions of the charterers as regards employment, agency and other arrangements, but it did not do so as regards navigation. In that case, providing ballast was incidental to the employment, not part of it, as in this sailing at a particular time was only indirectly connected with the employment. It was suggested on behalf of the respondent that a loss or claim due to deviation or change of voyage upon the instructions of the charterers after bills of lading have been signed was the class of order which the clause contemplated and that in any case the charterer cannot be called upon to indemnify the owner in respect of losses for which provision is otherwise made in the charterparty. My Lords, in the present case, I do not think it necessary to determine the exact limitation to be placed on the meaning of the word. It is, I think, enough to say that an order to sail at once, whether wisely or unwisely given, is not within the clause as properly construed. (2.) The second answer of the respondents was that even if it were conceded that orders to sail in a storm were orders in respect of which an indemnity is due, they must still be orders of the charterers as charterers and such as under this charterparty they are entitled to give. The mere instruction to sail may be such an order, but such an instruction leaves it to the discretion of the master who is responsible for the safety of his ship to choose the time and opportunity for starting on his voyage. I know of no right on the part of a charterer to insist that the safety of the ship should be endangered by sailing at a time when seamanship requires her to stay in port. The naval authorities however have this power and, whatever the risk, their orders must be obeyed. The first officer, indeed, recognized the order as that of the naval authorities, when he said in answer to the question " Why did you leave ? " " Naval " orders." In my view the respondent is right in his contention that the order to put to sea on the night of October 13 was not a charterer's but a naval order, none the

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(1) [1900] A. C. 525, 532, 533.

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less though the Crown is both charterer and the source from which naval authority is derived. The written order to sail, which did not specify any time for compliance except the finish of discharge, left it to the master to choose his time and opportunity but did not cause the loss: the oral order which followed it was not a charterer's but a naval order and therefore not one for which the charterers are responsible. (3.) Finally it was urged that neither the order nor sailing in obedience to it caused the loss. In *Portsmouth Steamship Co., Ld.* v. *Liverpool and Glasgow Salvage Association* (1), Lord Roche (then Roche J.) points out that the clause, where it applies, covers only losses arising directly from charterer's instructions, " because," as he says, " if some act of negligence intervenes " or some marine casualty intervenes then the chain of causa- " tion is broken and the indemnity does not operate." I do not think your Lordships are called on to determine the soundness of this argument in the present case. It might be urged that a loss following upon an order to sail into danger which is complied with and results in damage due to the contemplated risk is a consequence of that order, but to decide it in this case is unnecessary and I prefer to express no opinion upon it either in favour or against. For the reasons given above, however, I would dismiss the appeal and confirm the order of the Court of Appeal, and order the appellants to pay the costs incurred in your Lordships' House.

Lord Goddard. My Lords, I have had an opportunity of reading the opinion of my noble and learned friend Lord Porter, in which I concur.

Appeal dismissed.

Solicitors for appellants: *Lightbounds, Jones & Co.*
Solicitor for respondents: *Treasury Solicitor.*

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(1) 34 Ll. L. Rep. 459, 462.

J. C.*

1945

May 29.

[PRIVY COUNCIL.]

PARASHURAM DETARAM SHAMDASANI APPELLANT;

AND

KING-EMPEROR . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Contempt of Court—Litigant in person—Insult to opposing counsel during argument—Reflection on taxing masters—Not a contempt—Principles applicable—Costs.

The appellant, who was appearing in person on a summons to review taxation of the costs of an action in which he had been an unsuccessful plaintiff, having been accused by opposing counsel in the course of the argument of misleading the court as to the nature of the issues raised in the action, replied: "I do not keep anything "back at all. My fault is that I disclose everything, unlike "members of the Bar, who are in the habit of not doing so and "misleading the court." Later, in dealing with the statement by the taxing master, with regard to the allowance of discretionary items, that he had taken into consideration all the matters mentioned in r. 563 of the High Court Rules, the appellant said: "It is customary for the taxing masters to write what is written "at the end of the paragraph, but is it considered at all?" The appellant was found guilty of contempt of court both in his reflections on the Bar and on the taxing masters:—

Held, first, that the words used by the appellant respecting the Bar, and which must be taken to have been intended by him to refer to the opposing counsel in particular, did not, and could not, amount to a contempt of court. For words or action used in the face of the court, or in the course of proceedings, to be a contempt, they must be such as would interfere, or tend to interfere, with the course of justice. An insult to counsel or to the opposing litigant is very different from an insult to the court itself or to members of the jury, who form part of the tribunal, though conceivably if a litigant or an advocate used language so outrageous and provocative as to be likely to lead to a brawl in court the offence could be said to have been committed.

Ex parte Pater (1864) 5 B. & S. 299, referred to.

Held, secondly, that while, no doubt, if a litigant were to suggest in court that its officers were corrupt or habitually failed to carry out their duties the court might consider it a contempt, though if it were only the latter that was suggested it would be unwise to do so, here in the light of all the circumstances the words relating to the taxing masters afforded no reasonable grounds for adjudging the appellant guilty of contempt of court.

The summary power of punishing for contempt should be used sparingly and only in serious cases, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended.

**Present*: LORD MACMILLAN, LORD GODDARD and SIR MADHAVAN NAIR.

While in a criminal appeal opposed by the Crown costs are not in practice awarded to a successful appellant, the present matter, although known as a criminal contempt, was in a different category from an ordinary criminal case, and its particular circumstances were such that the appellant was awarded the costs of the appeal.

Order of Kania J. set aside.

APPEAL (No. 23 of 1944) from a judgment and order of the High Court (Kania J.) (October 15, 1942), as modified by an order of that judge (October 16, 1942).

The question in this appeal was whether the appellant had in all the circumstances committed the offence of contempt of court in making the following two statements in open court before Kania J. on October 9, 1942, in the course of argument on a summons for a review of taxation of costs: (*a*) "I do not "keep anything back at all. My fault is that I disclose "everything, unlike members of the Bar, who are in the habit "of not doing so and misleading the court." (*b*) "It is "customary for the taxing masters to write what is written "at the end of the paragraph, but is it considered at all?"

Kania J. found the appellant guilty of contempt of court in respect of both matters, and sentenced him to imprisonment for eight days and ordered him to pay a fine of Rs. 1.000. On November 18, 1942, the High Court (Beaumont C.J. and Sen J.) granted the appellant leave to appeal to His Majesty in Council against the order of Kania J.

1945. Apr. 12. *W. W. K. Page* for the appellant. The appellant was not, in making either of the statements in question, in contempt of the court. Neither *R.* v. *Davison* (1) nor *French* v. *French* (2) mentioned in the judgment of Kania J. is authority on this case. It would not seem that authority is needed. It is not a matter of the dignity of the court at all, or of any question of any interference with the administration of justice. It was never suggested that the words regarding the Bar were in reference to the opposing counsel, Mr. Desai, personally.

[He was stopped after reading the judgment of the Bombay High Court giving the appellant leave to appeal to the Board.]

Tucker K.C. and *B. MacKenna* for the respondent. The

(1) (1821) 4 B. & Ald. 329.

(2) (1824) 1 Hogan 138.

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appellant was guilty of contempt of court under both heads as alleged. There is a question of principle underlying this appeal, and the first question, as in all cases of criminal contempt, is, can the conduct on its facts amount to contempt in law? It depends on what was said, how it was said and the circumstances in which it was said—on trying to recreate the atmosphere in which the observations were made. The test, looking at the course of conduct, is, does it, or might it tend, to obstruct the administration of justice: Oswald on Contempt, 3rd ed., pp. 48, 52; Halsbury's Laws of England, 2nd ed., vol. VII., p. 2; *R.* v. *Davison* (1), and *Anantalal Singha* v. *Watson* (2), which last-mentioned case gives a true enunciation of the principles applicable. *In re Abdul Hasan Jauhar* (3) appears to show that insults to counsel during the course of a case may amount to contempt of court, and Beaumont C.J. in his judgment giving leave to appeal in this case said "I do "not doubt for a moment that insults to counsel engaged in "a case can be dealt with in contempt." Looking at the words that were spoken here, the inference is that the appellant was referring to Mr. Desai personally and insulting him—including him first and anybody else after. [Reference was made to *Ex parte Pater* (4).] An apology is merely to prevent punishment. With regard to the words relating to the taxing masters, it is not known exactly in what circumstances they were said, or how they were said, but they must have upset the judge considerably, and must have been something more than an unguarded remark. They could in law be a contempt, and if they were, this Board would not interfere with the decision as to punishment.

W. W. K. Page replied, and asked for costs.

Tucker K.C. referred to *McLeod* v. *St. Aubyn* (5), as the only case in which the Board had given costs in such a case.

May 29. The judgment of their Lordships was delivered by LORD GODDARD: This is an appeal from an order of the High Court of Bombay made by Kania J. adjudging that the appellant was guilty of a contempt of court, committing him to prison for three months, and ordering him to pay a fine of Rs.1,000. On the day after the order was made the appellant

(1) 4 B. & Ald. 329.

(2) (1930) I. L. R. 58 C. 884, 889.

(3) (1926) I. L. R. 48 A. 711, 714, 719.

(4) (1864) 5 B. & S. 299, 303.

(5) [1899] A. C. 549.

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applied to the learned judge for a modification of the sentence, expressing sincere and unreserved regret for having used the expressions which were held to be a contempt, and the sentence was then reduced to one of eight days' imprisonment, but no alteration was made in the fine. The sentence of imprisonment was served, and the appellant then applied to the High Court in its appellate criminal jurisdiction for a certificate that the case was one fit for appeal to His Majesty in Council under cl. 41 of the Amended Letters Patent of 1865. This application was opposed by the Advocate-General, who submitted there was no jurisdiction to grant it, as it was said that the clause in question did not apply to a committal for contempt of court. The High Court (Beaumont C.J. and Sen J.) held that there was jurisdiction to grant a certificate and that it was a proper case in which to do so, and this was accepted as right by counsel for the respondent before this Board, and their Lordships accordingly do not think it necessary to express any opinion on this matter.

The appellant had been an unsuccessful plaintiff in a suit in the High Court and had been ordered to pay costs. They were taxed and the appellant then took out a summons to review the taxation, and, though a layman, appeared in person to support his objections. In the course of the hearing counsel opposing stated that the appellant was misleading the court as to the nature of the issues raised in the action, and insisted that he should read out a paragraph in the plaint. The appellant then said: "I do not keep anything back at all. My fault is that "I disclose everything, unlike members of the Bar, who are in "the habit of not doing so and misleading the court." This caused a protest from the opposing counsel, Mr. Desai, whereupon the appellant immediately apologized and expressed his regret for having used an unfortunate expression in the heat of argument. Later, in dealing with the taxing master's statement, with regard to the allowance of discretionary items, that he had taken into consideration all the matters mentioned in r. 563, the appellant said: "It is customary for the taxing "masters to write what is written at the end of the paragraph, "but is it considered at all?" No protest or observation on this statement was made either by Bench or Bar at the time when it was uttered, nor when judgment was given, and it appears to their Lordships that it must have been regarded as no more than the sort of tactless and intemperate statement that is not infrequently made in the heat of argument, and not only by litigants in person. On October 13, 1942, the appellant concluded his argument and the court proceeded to give judgment, but had not finished doing so at the end of the day. At the rising of the court Mr. Desai stated that he would draw the attention of the court to the statement made by the appellant with reference to the Bar and would apply that appropriate action be taken. On the next day both Mr. Desai and the Advocate-General of Bombay appeared, and, though the appellant again apologized and expressed regret for what he had said, moved the court to punish the appellant for a contempt in using the language he did regarding the Bar. In the course of the argument the learned judge himself then raised the question as to the words the appellant had used relating to the taxing masters. On the following day the learned judge delivered a lengthy judgment, reviewing some authorities, and, coming to the conclusion that the appellant had been guilty of a contempt both in his reflections on the Bar and on the taxing masters, made the order against which this appeal is brought.

Dealing first with the appellant's reference to the conduct of the Bar, their Lordships share the surprise expressed by the Chief Justice when granting the certificate for appeal as to what he described as the somewhat undue degree of sensitiveness displayed in taking so serious a view of what had been said. Their Lordships would, indeed, go further, and say that it would have been more consonant with the dignity of the Bar to have ignored a foolish remark which has been made over and over again, not only by the ignorant, but by people who ought to know better, and, no doubt, will continue to be made so long as there is a profession of advocacy. To treat such words as requiring the exercise by the court of its summary powers of punishment is not only to make a mountain out of a molehill but to give a wholly undeserved advertisement to what had far better have been treated as unworthy of either answer or even notice. But, apart from the question whether the motion was wise or expedient, it has to be decided whether these words could be properly regarded as a contempt of court. The principle to be applied is clear enough. For words or action used in face of the court, or in the course of proceedings, for they may be used outside the court, to be a contempt, they must be such as would interfere, or tend to interfere, with the course of justice. No further definition can be attempted. It must be rare indeed for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an opponent, whether counsel or litigant. If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding judge he may very properly be adjudged guilty of contempt of court, but then the offence is the disregard of the ruling and setting the court at defiance. So, also, if a litigant or an advocate threatened or attempted violence on his opponent, or conceivably if he used language so outrageous and provocative as to be likely to lead to a brawl in court, the offence could be said to have been committed. An insult to counsel or to the opposing litigant is very different from an insult to the court itself or to members of a jury who form part of the tribunal. Their Lordships mention this matter because their attention was drawn to *Ex parte Pater* (1), where a member of the Bar was adjudged guilty of contempt by the Middlesex Quarter Sessions and fined for insulting a juryman and persisting in his conduct when reproved by the deputy assistant judge. The Court of Queen's Bench refused to interfere and would not grant a certiorari to quash the order, saying that they could not act as a court of appeal from the sessions. But it is quite clear that the court's refusal was based on the fact that there was evidence of conduct which could amount to contempt, and the court held itself free to inquire whether the inferior court had reasonable grounds for adjudging that a contempt had been committed. Their Lordships think it unnecessary for them to deal with *R.* v. *Davison* (2) and *French* v. *French* (3) on which Kania J. relied, as the judgment of Beaumont C.J. has already shown that they do not support the propositions that the learned judge thought they did, and the Board entirely agree with the Chief Justice. In their Lordships' opinion the words used by the appellant respecting the Bar, and which must be taken to have been intended by him to refer to Mr. Desai in particular, did not, and could not, amount to a contempt of court, and consequently there was no jurisdiction in the learned judge to exercise his summary powers in respect of them.

With regard to the words relating to the taxing masters, no doubt if a litigant were to suggest in court that its officers were corrupt or habitually failed to carry out their duties the court might consider it a contempt, though if it were only the latter that was suggested it would be unwise to do so. But when all the circumstances here are considered, and especially that when the words were uttered there was no reproof or

(1) 5 B. & S. 299. (2) 4 B. & Ald. 329. (3) 1 Hogan 138.

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even comment from the Bench, it is impossible to suppose that they were treated, or, indeed, intended, as more than a tactless way of suggesting that taxing masters were apt to deal somewhat summarily with such matters as were then in question. It was not till the Advocate-General was moving for punishment on the appellant in respect of the other words that any notice seems to have been taken of the matter, and then by the judge himself, somewhat late in the day as it seems to their Lordships. In their opinion they afford no reasonable grounds for adjudging the appellant guilty of so grave an offence as contempt of court, and on this point also their Lordships are glad to find that their opinion and that of the Chief Justice and Sen J. coincide.

Their Lordships would once again emphasize what has often been said before, that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. The Bar can surely maintain its dignity and prestige without having to invoke this jurisdiction.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of the learned judge set aside. It should have been said that originally the Chief Justice and other judges of the High Court were made respondents to this appeal. It was afterwards realized that this was incorrect, and by an Order in Council, dated October 27, 1944, the Crown was substituted as respondent. Where the Crown appears to uphold a conviction in a criminal case it is not the practice to award costs to the appellant in the event of the appeal succeeding. Although this matter is one which is known as a criminal contempt it obviously is in a different category from an ordinary criminal case. It is a matter of some surprise to their Lordships that in spite of the emphatic opinion of the Chief Justice and another judge of the court of which the appellant was alleged to be in contempt that no contempt had been committed, the Executive should have deemed it necessary not only to appear but to have endeavoured to uphold this order. In these circumstances their Lordships are of opinion that the appellant should have the costs of this appeal.

Solicitors for appellant: *Sanderson, Lee & Co.*
Solicitor for respondent: *Solicitor, India Office.*

[PRIVY COUNCIL.]

J. C.*
1945
July 17.

MARSH . . . . APPELLANT;

AND

MARSH . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF JAMAICA.

Jamaica—Divorce—Intervention—Practice—Decree absolute—Abatement of appeal by intervener on death of petitioner—Decree unaffected—Non-compliance with procedural rules—Irregularity—Waiver—Decree absolute voidable only—Divorce Law, No. 14 *of* 1879, *s.* 19 (*Laws of Jamaica, rev. ed.*, 1938, *c.* 442, *s.* 25)—*Jamaica Divorce Rules, rr.* 35, 36.

An intervener, pursuant to s. 19 of the Divorce Law, 1879, and r. 35 of the Divorce Rules, having on January 15, 1934, entered an appearance in divorce proceedings to show cause why a decree nisi against the appellant, obtained on January 10, 1933, should not be made absolute, the court, though the period of four days within which under r. 36 he was permitted to file affidavits in support of his intervention had not expired, made the decree absolute on January 19, 1934. On the preceding day, when application for an extension of time for filing affidavits had been made, and refused, the court was given to understand that the intervention would not be proceeded with because the necessary material could not be procured within the time allowed, and in fact the intervener allowed the order absolute to be made in his presence without protest. Thereafter, on August 14, 1934, special leave to appeal to His Majesty in Council against the making of the decree absolute was granted to the intervener, but the petitioner in the divorce proceedings having died after the arguments before the Board were concluded but before judgment was delivered, an Order in Council was passed to the effect that the appeal had abated, and no order was made thereon. On a claim by the present respondent in administration proceedings in respect of the deceased petitioner's estate that in the above circumstances the decree absolute was valid and that the appellant was not the widow of the deceased petitioner:—

Held, first, that the fact that at the date of the death of the petitioner the intervener's appeal to the Board was pending did not prevent the decree absolute—assuming it to have been a valid decree—from operating so as to deprive the appellant of her status as the wife of the deceased. The decree dissolved the marriage from the moment it was pronounced, and at the date when the appeal by the intervener abated it stood unreversed. The fact that neither spouse could remarry until the time for appealing had expired in no way affected the full operation of the decree. It was a judgment in rem, and unless and until a court of appeal reversed it the marriage was for all purposes at an end.

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* *Present:* LORD PORTER, LORD MERRIMAN, LORD GODDARD, SIR MADHAVAN NAIR and SIR JOHN BEAUMONT.

Held, secondly, that while no decisive test has been laid down for distinguishing between procedural irregularities which render a judgment or order void or only voidable, one test is to inquire whether the irregularity has caused a failure of natural justice, and on the view that it was irregular to have proceeded with the making of the decree absolute before the four days had elapsed from the entering of the appearance, the irregularity was not such as had caused a failure of natural justice, and accordingly the order absolute was voidable only, and the appellant having taken no steps to set it aside, it was valid and subsisting.

Anlaby v. *Prætorius* (1888) 20 Q. B. D. 764, *Smurthwaite* v. *Hannay* [1894] A. C. 494, and *McPherson* v. *McPherson* [1936] A. C. 177, referred to.

Held, also, however, that on the facts there was no irregularity, since it was open to an intervener, as he did here, to say that in the circumstances he did not intend to proceed with showing cause, and the way was then clear for a decree absolute, provided the statutory period had expired. Further, where a litigant has acquiesced in or waived an irregularity he cannot afterwards complain of it.

Fry v. *Moore* (1889) 23 Q. B. D. 395, referred to.

Intervention can always take place at any time before the decree is made absolute: *Bowen* v. *Bowen and Evans* (1864) 3 Sw. & Tr. 530.

To comply with r. 36 of the Jamaica Divorce Rules an affidavit must be that of someone prepared to swear of his own knowledge to some relevant fact, or at least one which sets out the sources of information and swears to a belief therein.

Judgment of the Court of Appeal affirmed.

APPEAL (No. 58 of 1943), by special leave in forma pauperis, from a judgment of the Court of Appeal of the Supreme Court of Jamaica (July 24 and 31, 1941), on the hearing and disposal of certain points of law raised by the pleadings in an action between the parties to this appeal, which were ordered to be heard and disposed of before the trial of the action. In the action the respondent, Norman Leslie FitzMorris Marsh, as plaintiff, claimed to be the only brother, sole next of kin and heir at law of one Osmond Vincent Marsh, who died intestate on January 11, 1936, and claimed as such the grant of letters of administration of the estate of the deceased. The appellant, Olive French Marsh, was defendant in the action, and the substantial question in this appeal was whether she was or was not the lawful widow of the deceased at the date of his death, and whether the marriage between her and the deceased was or was not subsisting at that date.

The following facts are taken from the judgment of the Judicial Committee: On June 12, 1936, the respondent issued a writ in the Supreme Court of Judicature, Jamaica, claiming to be the only lawful brother, sole next of kin, and heir at law of Osmond Vincent Marsh, deceased, who died on January 11, 1936, intestate, and claiming administration of his estate. The writ was issued against the appellant because she had entered a caveat and had alleged that she was the widow of the deceased. The statement of claim denied the interest of the appellant and alleged that she had been divorced by the deceased, a decree nisi obtained by him on January 10, 1933, having been made absolute on January 19, 1934. By her defence the appellant disputed the validity of the decree absolute. Concisely stated, the allegations set out in para. 3 of the defence were that on January 15, 1934, one E. A. L. Hodge, pursuant to s. 19 of the Divorce Law of 1879 and r. 35 of the Divorce Rules, appeared in the proceedings to show cause against the decree being made absolute, but that the court, without notice to him and though the period of four days within which under the rules he was permitted to file affidavits in support of his intervention had not expired, proceeded to make the decree absolute. It was further alleged that Hodge applied for leave to appeal to His Majesty in Council against the making of the decree absolute, and that his application was refused by the court, but that special leave was granted by Order in Council, dated August 14, 1934. Then it was pleaded that after the arguments before the Board were concluded, but before judgment was delivered, it was ascertained that the deceased had died, whereupon an Order in Council was passed to the effect that the appeal had abated and no order was made except that the security lodged be returned to the said Hodge. On March 1, 1940, an order was made in the action whereby, assuming the facts pleaded in the defence were established and assuming that the plaintiff was the only lawful brother and sole next of kin and heir at law of the deceased, certain points of law were set down for hearing before the trial. It is unnecessary to set out the seven points of law directed to be decided in extenso, as it was agreed that they all came down to the single question whether or not the decree absolute in the circumstances was valid. The order directed that the points of law should be argued before the Court of Appeal, and on July 24, 1941, that court (Furness C.J., Seton and Savary JJ.) determined all the questions in favour of the plaintiff. By Order in Council of July 22, 1943, special leave to appeal against their judgment was granted.

1945. May 31; June 1, 4. *Comyns Carr K.C.* and *Bernstein* for the appellant. There are two main points: (1.) Does the fact that at the date of the death of the deceased the appeal by Mr. Hodge, the intervener, was pending before this Board in itself, and regardless of the merits of the appeal, prevent the decree absolute from having the effect of rendering the appellant no longer the wife of the deceased at the date of his death? (2.) Is the failure to comply with the rules of the court in Jamaica in respect of Mr. Hodge's intervention of such a kind that it renders the decree absolute ineffective for the purpose of depriving her of status? It is submitted that the fact that the appeal was pending holds up the decree absolute so that it has not affected the status of the parties. No remarriage can take place until the time for appealing has elapsed. A divorce proceeding is in a totally different category from any civil action, because it affects personal status. If the submission for the appellant is not right, there is the extraordinary state of affairs that a decree absolute was made, regularly or irregularly does not matter—it was pronounced—and thereupon the parties ceased to be husband and wife, an appeal is brought, and succeeds, whereupon without any ceremony of remarriage they become husband and wife again. That is an impossible state of affairs. It was said in *Wilkinson* v. *Gibson* (1) that "the power having been given to this tribunal "with a right of appeal, should the appeal be successful the "marriage would not be annulled, and it would be extremely "inconvenient if the marriage of either party were permitted "in the interval" (2). [Reference was also made to *Chichester* v. *Mure* (3).] That is also the true view of the Jamaican legislation; there cannot be a state of marriage one day, unmarried the next, and married again the day after, unless there is express provision to that effect. The requirements of status in regard to an appeal are different from the requirements of property; it cannot have been the intention that status should be altered until it is altered once and for all.

(1) (1867) L. R. 4 Eq. 162.
(2) Ibid. 168.
(3) (1863) 3 Sw. & Tr. 223, 232.

Section 10 of the Supreme Court of Judicature Act, 1881, of this country was never incorporated in Jamaica.

With regard to the second point, namely, that the fact that the decree was made absolute before the four days allowed for filing affidavits in support of the intervention had expired constituted such an infringement of the conditions of a purely statutory jurisdiction that the decree is void, the whole question is as to the nature and effect of the irregularity. The respondent in his printed case submits that the appearance entered by Mr. Hodge was in the circumstances out of time, s. 19 of the Divorce Law of 1879, stating that " The decree shall not be " made absolute till after the expiration of six months from the " date of the decree nisi, and during that period any person " may show cause . . . ." The English courts have said that " during that period " in similar legislation here means down to the date of the decree absolute being pronounced : *Bowen* v. *Bowen and Evans* (1), which was followed in *Poole* v. *Poole and Charlton* (2), and there has been a continuous following of that decision. If there is any difference between the two sections—s. 19 of the Jamaican Act of 1879 and s. 7 of English Matrimonial Causes Act, 1860—it is easier to arrive at that conclusion on the Jamaican Act than it is on the English Act.

The proposition that a decree absolute cannot be attacked in any proceedings in divorce after the death of the petitioner is no doubt correct, but this is not a proceeding in divorce or one between the same parties. The decree absolute is void. If it was voidable only the fact that the appellant cannot avoid the decree as a decree in the divorce court does not prevent her from saying in quite other proceedings against a different party that the decree is bad. The irregularity here is of quite a different kind from that in *McPherson* v. *McPherson* (3), and therefore the decree is void and not merely voidable. The irregularity in *McPherson's* case (3) was at the decree nisi stage. The present case is subject to the fundamental defect that a party entitled to be heard has been barred, and also it is not subject to the saving grace that afterwards any intervention on the part of the public could have put the matter right. *McPherson's* case (3) has no application here. *Anlaby* v. *Prætorius* (4) is much the same as this case, except that here the effect of the irregularity is much more serious. [Reference

(1) (1864) 3 Sw. & Tr. 530.
(2) (1896) 12 T. L. R. 509.
(3) [1936] A. C. 177.
(4) (1888) 20 Q. B. D. 764.

was also made to *Smurthwaite* v. *Hannay* (1).] Section 684 of the Civil Procedure Code of Jamaica is similar to Or. 70, r. 1, of the English Rules of the Supreme Court, but that section is not expressly provided to apply to divorce proceedings. When there is found in r. 35 of the Supreme Court (Jamaica) General Rules and Orders provision that anything not provided for in the rules shall be dealt with in accordance with the practice and procedure in England, that cannot, in the face of the express enactment of s. 684 of the Civil Procedure Code, incorporate Or. 70, r. 1, into the Divorce Rules of Jamaica. The time during which the intervener was entitled to be heard had not passed; as soon as an appearance is entered the whole proceedings are automatically held up for four days at least. It could not be said that anything which the solicitor for the intervener did here at the highest amounts to more than waiver; it is submitted that it did not amount to that. *Hamp-Adams* v. *Hall* (2) and *Muir* v. *Jenks* (3) were recently reviewed in *Craig* v. *Kanssen* (4), which deals with the difference between what constitutes nullity and what constitutes an irregularity. [Reference was also made to *Fry* v. *Moore* (5) and *Lazard Brothers & Co.* v. *Midland Bank* (6).] In all the cases except the last cited a step was taken by one of the parties to the proceeding to set aside the judgment claimed to be a nullity or irregularity, as the case might be, in the proceeding itself, but in *Lazard Brothers & Co.* v. *Midland Bank* (6) the House of Lords treated as a nullity in other proceedings a judgment which had not been set aside, and no attempt had been made to do so, and that, therefore, is more analogous to the position in this case.

The first proposition is that the decree absolute is a nullity, and therefore must be ignored in these proceedings—it is void. Assuming, however, that it is only voidable, it is voidable at the option of any person affected, and the questions then arise, how long does that option extend and what circumstances bring it to an end? Nothing has happened which precludes the appellant from appealing. Nobody is going to be prejudiced by the exercise of the option now who would not have been before. The test is, has the failure to act caused the other party to change his position to his disadvantage? There is no prejudice either to the estate or to the claim of the respondent to inherit by reason of the appellant not taking any steps.

(1) [1894] A. C. 494.
(2) [1911] 2 K. B. 942.
(3) [1913] 2 K. B. 412.
(4) [1943] K. B. 256.
(5) (1889) 23 Q. B. D. 395.
(6) [1933] A. C. 289.

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Bernstein followed, and referred to *Napier* v. *Napier* (1), *Sloggett* v. *Sloggett* (2) and *Stanhope* v. *Stanhope* (3).

L. O'Malley for the respondent. None of the cases cited for the appellant would appear to involve, as does this case, a decision given by a court of competent jurisdiction, with all the facts before it, that there should be a decree absolute. Those cases are not analogous at all; in each of them the point before the court was not whether there had been some breach of a statutory provision, but whether what had happened was contrary to natural justice. In *Anlaby* v. *Prætorius* (4) the defendant never had an opportunity of putting his defence before the court. *Fry* v. *Moore* (5) is in this respondent's favour, assuming that Or. 70 applies; there it was held that there was an irregularity which could in fact be waived. *Hamp-Adams* v. *Hall* (6) represents the high-water mark, and goes furthest in favour of the appellant, and is a somewhat difficult one from the respondent's point of view. The root of the matter has been whether there has been a substantial miscarriage of justice—has something been done which is contrary to natural justice? Assuming that there has been a breach of the rules, it is submitted that in any event this decree is voidable only, and not void: *Dimes* v. *Proprietors of the Grand Junction Canal* (7), *McPherson* v. *McPherson* (8). Great public confusion would be caused if there were any other result—it is a judgment which affects status. A decree absolute can never be void, and can always be avoided. As soon as the time limited for appealing has expired, and no appeal has been presented, the parties may remarry. The appellant has not appealed, she cannot appeal—her husband is dead; he cannot defend himself. It is not open to her to go before one judge—the decree having been pronounced by three judges—and ask him to make a declaration the effect of which is to get over the decree. The decree absolute is one entered on the files of the court as regular in every respect, and not having been appealed from by the appellant, it is not competent for her to take proceedings for a declaration that she was the lawful widow of the deceased.

Bernstein replied. There has been a fundamental departure from the requirements of the law, with the result that the making of this decree absolute was without jurisdiction, and the

(1) [1915] P. 184.
(2) [1928] P. 148, 153.
(3) (1886) 11 P. D. 103.
(4) 20 Q. B. D. 764.
(5) 23 Q. B. D. 395.
(6) [1911] 2 K. B. 942.
(7) (1852) 3 H. L. C. 759.
(8) [1936] A. C. 177.

decree itself is void. *McPherson's* case (1) was a decision on its particular facts, and laid down no principle at all. [Reference was also made to *Craig* v. *Kanssen* (2).]

July 17. The judgment of their Lordships was delivered by LORD GODDARD, who stated the facts set out above and continued: As the defendant (appellant) expressly referred, in para. 3 of the defence, to the record in the divorce proceedings and in the subsequent appeal to this Board, there is no question but that the court in Jamaica and their Lordships in the present appeal can refer to these documents for the purpose of elucidating the facts. On the hearing of the appeal Mr. Comyns Carr, for the appellant, formulated two questions. The first was, does the fact that at the date of the death of the deceased the intervener's appeal was pending prevent the decree absolute operating so as to deprive the appellant of her status as the wife of the deceased? This, of course, assumes that the decree absolute was a valid decree, and on that assumption the question admits of only one answer. It dissolved the marriage from the moment it was pronounced, and at the date when the appeal by the intervener abated it stood unreversed. The fact that neither spouse could remarry until the time for appealing had expired in no way affects the full operation of the decree. It is a judgment in rem, and unless and until a court of appeal reversed it the marriage was for all purposes at an end. The second question was whether the failure to comply with the rules relating to intervention, in that the decree absolute was pronounced on the third instead of the fourth day after the intervener had entered an appearance, renders the decree null and void. To answer this question it is necessary to examine the facts preceding the pronouncement of the decree in careful detail.

The hearing of the petition was in January, 1933. In her answer the respondent, the present appellant, denied adultery and pleaded condonation, but made no other cross-charge. At the hearing she appeared in person, and apparently made no attempt to prove the charge of condonation and declined any assistance from the learned judge, stating she had no witnesses nor anything to say to the court. He thereupon, being satisfied with the petitioner's evidence, pronounced a decree nisi. She seems then to have left Jamaica for England and here sought out Mr. Hodge, who was an old friend of her family and, it is said, an executor and trustee of her father's will. He determined to lay certain facts before the Attorney-General of Jamaica with a view to inducing him to intervene in the suit for the purpose of having the decree nisi rescinded. There is no official corresponding to the King's Proctor in the colony, and anyone who intervenes does so as a member of the public, though doubtless, in a proper case, the Attorney-General would deem it his duty to intervene, albeit that in so doing he would technically be acting not in an official but a private capacity. It is not suggested that Mr. Hodge had any personal knowledge of the facts ; the knowledge could only be derived from the information supplied by the present appellant, who, it should be stated, had never appealed or attempted to appeal against the decree.

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(1) [1936] A. C. 177.

(2) [1943] K. B. 256, 259.

It will now be convenient to set out the relevant section of the Divorce Law and the rules relating to intervention. The rules are made under s. 7 of the Act, and thus have statutory force. They are as follows :—

Section 19.—" The decree shall not be made absolute till " after the expiration of six months from the date of the decree " nisi, and during that period any person may show cause why " the decree should not be made absolute by reason of the " same having been obtained by collusion, or by reason of " material facts not brought before the court. On cause being " shown, the court shall deal with the case by making the " decree absolute, or by reversing the decree nisi, or by " requiring further enquiry or otherwise as justice may " require."

Rule 35.—" Any person wishing to show cause against " making absolute a decree nisi for dissolution of a marriage " shall enter an appearance in the cause in which such decree " nisi has been pronounced."

Rule 36.—" Any such person shall at the time of entering an " appearance, or within four days thereafter, file affidavits " setting forth the facts upon which he relies."

There are other rules dealing with the filing of affidavits in answer and reply, and also with the mode of trial, but it is unnecessary to set them out.

A motion to make the decree absolute was set down on November 17, 1933, for hearing on November 20, accompanied by an affidavit that no person had obtained leave to intervene or had entered an appearance for that purpose as required by r. 45, and this was true. But meanwhile Mr. Hodge had forwarded to the Attorney-General the information he had obtained relating to alleged acts of connivance on the part of the petitioner, who, it was said, had encouraged his wife to commit adultery. It is said that this information comprised statements by nine persons, presumably resident in Jamaica, but it has never appeared in any of the subsequent proceedings how those statements were obtained, or whether they were statements actually taken from the proposed witnesses, or whether they were no more than what Mr. Hodge, from what the present appellant had told him, believed and hoped they would say if they were called. Then it appears that about November 13, 1933, the solicitors acting for Mr. Hodge in Jamaica placed before the Attorney-General "statements and "evidence" relating to the matter. In view of what happened later this is a matter of some importance, for it suggests that by November 13 the solicitors had actually obtained evidence from persons in the colony who could be called as witnesses. With this information before him the Attorney-General obtained an adjournment of the motion for two months, namely, till January 15, 1934, and it is said that during the interval further information was supplied to him, including statements by four out of the nine persons referred to above, so this again shows that the solicitors had some evidence in their possession. However, on January 12, 1934, the Attorney-General orally informed the solicitors that he did not propose to intervene but left it to Mr. Hodge to enter an appearance if he so desired. On the 15th the motion came on for hearing before the Full Court, and the Attorney-General informed the court that after investigating the matter he did not intend to take any further steps. Counsel for the petitioner then asked for a decree absolute, but the registrar informed the court that an appearance had been entered that morning for Mr. Hodge for the purpose of showing cause. The Chief Justice then said that "as a matter of precaution" the motion would be adjourned till Friday, January 19. It seems that both the court and the petitioner's counsel made the mistake of assuming that this would allow the four days within which the intervener must file his affidavits under r. 36, whereas in fact it only allowed three, and it is this mistake which has been the cause of all the trouble that has ensued. On January 17 the solicitors for Mr. Hodge filed a motion, returnable the next day, asking that the time for filing affidavits might be extended for ten weeks or such other time as the court should think just, and on the 18th leading counsel appeared and supported the motion with an affidavit by the petitioner's solicitor. This stated that in consequence of the intimation from the Attorney-General that he did not intend to intervene instructions had been obtained by cable from Mr. Hodge in England in pursuance of which an appearance had been entered, but that it was not possible to obtain an affidavit from him in the four days prescribed by the rule. It was further stated that an important deponent in support of the showing cause was the respondent in the suit, who was also then in England. No other intended deponent was mentioned. There was no suggestion that there was any evidence which had been, or could be, obtained from anyone in the colony, and it is at least remarkable that if the persons who had given statements were still willing witnesses, and the evidence they could have given was considered trustworthy, that their statements were not exhibited, nor was the court even told of their existence. Moreover, it appears from the judgment of Adrian Clark J., delivered on Mr. Hodge's application for leave to appeal to His Majesty in Council, that his leading counsel informed the court when he applied for the extension of time that unless it was granted he would be unable to file any affidavits. In view of this affidavit and the statement of counsel it seems clear that both the court and the petitioner's representative were given to understand that unless an extension was granted Mr. Hodge would be unable to proceed with his intervention. In the result, the court declined to grant any extension of time, and the motion for decree absolute stood for the following day. Again no one called attention to the fact that four days would not have elapsed since the appearance, and the Chief Justice said on the application for leave to appeal that had the attention of the court been called to this fact he would have been willing to grant an adjournment to the following Monday to avoid the possibility of this point being taken, though such adjournment would not have aided the intervener. In his judgment the Chief Justice, when refusing leave to appeal, stated that the facts which weighed with the court in refusing an extension were—(1.) The grounds of the proposed intervention were not stated, and no reason was suggested why the petitioner was not entitled to a decree. (2.) No intervention had taken place within the statutory six months; the matter had been already adjourned to enable the Attorney-General to make investigations, and after investigation, he had informed the court that he did not

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propose to intervene. (3.) It was not suggested that Mr. Hodge had any personal knowledge of any facts which would influence the decision of the court. (4.) So far as appeared his only knowledge consisted of statements made to him by the respondent, of the nature of which the court was not informed.

Nevertheless, their Lordships cannot but regret that some time was not allowed to the intervener, especially when it is remembered that his solicitors had only been informed of the decision of the Attorney-General on January 12. That the intervention had not taken place within six months of the decree nisi was really immaterial, as it is established beyond question that, contrary to the view expressed by Adrian Clark J. in his judgment, intervention can always take place at any time before the decree is made absolute—*Bowen* v. *Bowen and Evans* (1). However, it was within the discretionary power of the court to refuse the extension, and as the appeal subsequently brought by Mr. Hodge to His Majesty in Council abated by the petitioner's death the fact that their Lordships think an extension should have been granted cannot help the present appellant in these proceedings. As has already been said, the court and the petitioner's advisers were left on January 18 under the impression that Mr. Hodge's intervention could not proceed, though that is not to say that he abandoned it so as to deprive himself of a right of appeal. On the following day, at the sitting of the Full Court at 10.15 a.m., counsel applied for the decree to be made absolute. The registrar informed the court that the intervener's solicitor had telephoned inquiring when the motion would be called and had been told that it would come after some criminal appeals from prisoners in custody had been heard, and the court thereupon stood the motion over till later in the forenoon. When the application was renewed no one appeared to object and the decree was granted. It appears from the uncontradicted affidavit of Mr. Hart, the solicitor for the petitioner, that the solicitor for Mr. Hodge, who, as already stated, had inquired, and been informed, when the motion would be heard, was actually present in court when the order was made, yet he gave no intimation to the registrar, or took any other steps to inform the court, either that he objected to the decree being made absolute before the four days had expired or that he intended to file an affidavit. Later in the day he filed an affidavit to which he himself was the deponent. Their Lordships do not think it necessary to

(1) 3 Sw. & Tr. 530.

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express any opinion as to the probable reason he had for taking this step, considering that the proceedings, so far as the Full Court were concerned, were at an end ; if the decree was valid the affidavit, filed after it had been made, could not render it invalid ; if, on the other hand, the decree was ineffective as being made too soon it did not require this affidavit to avoid it. But there is some significance in the fact that the affidavit is no more than a statement of the grounds on which Mr. Hodge intended to rely in support of his intervention ; in truth, it was no more than a pleading or particulars. No facts were stated to be within the deponent's own knowledge, nor did he even swear to his belief in any of the matters to which he deposed. Their Lordships agree with the opinion of the court in Jamaica that such an affidavit is not one which should be regarded as complying with r. 36, and that for this purpose the affidavit must be that of someone prepared to swear of his own knowledge to some relevant fact, or at least, in their Lordships' opinion, one which sets out the sources of information and swears to a belief therein. But whether or not the affidavit complied with the rules is in the circumstances immaterial, except that it supports the view that on January 19 the solicitors for the intervener had no material evidence available in the colony, or if they had, it was not of a character which they felt they would be justified in placing before the court. No one suggests that had the matter stood over till the following Monday the position would have been different in this respect.

On these facts it appears to their Lordships that there are only two possible views, and whichever is adopted the validity of the decree absolute is beyond question. The first way in which the matter may be put is that on January 19, 1934, six months had elapsed since the decree nisi was pronounced and the court had therefore power to make the decree absolute unless there was an intervener prepared to show cause against it. An intervener had appeared but had on the previous day given the court to understand that he did not intend to follow up his appearance by showing cause, because he had not the necessary material available, and would not be able to procure it within the time allowed. While no doubt he could have resiled from that position on the 19th he did not, but stood by and allowed the court to proceed without giving any intimation that he had any objection, or desired to take any further step, though he had full knowledge that the court was proceeding to make the order. For this purpose, of course, there is no distinction between the intervener himself and the solicitor representing him. In this view there was in the opinion of their Lordships no irregularity, because it must be open to an intervener to say that he does not intend to show cause, and the way is then clear for a decree absolute provided that the statutory period has elapsed. The other view is that as the appearance stood, and had not been withdrawn, it was irregular to have proceeded before four days had elapsed. But it does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby* v. *Prætorius* (1) and *Smurthwaite* v. *Hannay* (2) are leading examples of the former, while *Fry* v. *Moore* (3) may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in *Fry* v. *Moore* (3) there has been a defect in the service but the writ had come to the knowledge of the defendant. *Hamp-Adams* v. *Hall* (4) really depends on different considerations ; it was a case depending on the application of positive law. The rule laid down in terms that before taking a certain step, namely, proceeding in default, endorsement of service must be made on the writ. If this condition is not fulfilled the plaintiff cannot take advantage of this particular procedure. *McPherson* v. *McPherson* (5) is an illustration of the rule that where there has been a defect in procedure which has not caused a failure of natural justice the resulting order is only voidable. Had the wife moved in that case before all parties, including herself, had remarried, as their Lordships understand that case, the result would have been different ; the decree could have been

(1) 20 Q. B. D. 764.
(2) [1894] A. C. 494.
(3) 23 Q. B. D. 395.
(4) [1911] 2 K. B. 942.
(5) [1936] A. C. 177.

recalled and a new trial ordered; as it was, it was too late, and by herself remarrying, the wife had adopted the decree. Then there is a third class of case. If a litigant has himself induced, acquiesced in or waived the irregularity he cannot afterwards complain of it. *Fry* v. *Moore* (1) really falls within this class, being a case of waiver. Suppose a person, knowing that another had issued, or was about to issue, a writ against him, wrote saying that he did not intend to appear and that so far as he was concerned judgment could be entered against him forthwith. If the plaintiff were able to persuade the Central Office to allow him on that letter to sign judgment before the time for appearance had expired, the defendant could not be heard to say that the judgment was a nullity. True, before it was signed he could have resiled and entered an appearance, but if he stood by and allowed the plaintiff to do that which he had been told he might do it would be impossible to treat the judgment as void, though if the defendant discovered he had a defence he might be allowed to set the judgment aside on terms. That is what really happened here; the intervener told the court and the petitioner that if he could not get an extension he would not, because he could not, show cause. He might have changed his mind before advantage was taken of the attitude that was taken up by him, but he did not, and allowed the order to be made in his presence without protest. Then there is another very important factor to be remembered: an intervener does not take action in the interest of either party. He intervenes solely in the interest of the public. If the court wrongly disallows his intervention no right of either petitioner or respondent is affected. The respondent could have appealed against either decree, and she did not, and she could not intervene. Different considerations might well arise if the court were deceived into stopping an intervention. That is not the case here, and the court have stated in terms their reasons for having acted as they did. The appeal brought by the intervener was ineffectual, it matters not for what reason, so he had no further right, and as the respondent to the petition failed to appeal she has no right to complain of the decree. In the opinion of their Lordships the decree absolute is valid and subsisting and the appellant's marriage to the deceased was finally dissolved as from its date. They will humbly advise His Majesty that this appeal should be dismissed. As the appellant is proceeding in forma pauperis there will be no order as to costs.

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(1) 23 Q. B. D. 395.

Solicitors for appellant: *Piper, Smith & Piper.*
Solicitors for respondent: *Hutchison & Cuff.*

H. L. (E.)*
1945
Apr. 16, 17; *June* 25.

[HOUSE OF LORDS.]

ALEXANDER AND ANOTHER . . . APPELLANTS
AND
TREDEGAR IRON & COAL COMPANY, LIMITED . . . . . . RESPONDENTS.

Mine—Coal mine—Haulage road—Obstruction—Horse-drawn damaged truck—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 47.

Master and servant—Common employment—Miner—Essential Work (*Coalmining Industry*) (*No.* 3) *Order,* 1941 (*St. R. & O.* 1941 *No.* 2096), *para.* 4.

A defective horse-drawn truck, legitimately on the haulage road in a coal mine, was being taken up to a place of repair by two miners, who had been continuously in the employment of the colliery company for some thirty years, when, owing to the negligence of a fellow-servant, several loaded trucks descending on the same rails, crashed into it and killed them. In an action under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, brought by the administratrixes of the deceased men against their employers:—

Held (1.) that the defective truck moving along the haulage road was not an "obstruction" within the meaning of s. 47 of the Coal Mines Act, 1911, which puts on the owners of collieries the duty of seeing that "every haulage road shall be kept clear "as far as possible of pieces of coal and other obstructions"; (2.) that the doctrine of common employment is not essentially based on the continuing freedom of the workman to leave the employment, and in this case, despite the restrictions imposed by the Essential Work (Coalmining Industry) (No. 3) Order, 1941, it constituted a good defence for the employers.

Quaere whether the doctrine of common employment applies to the case of workmen involuntarily directed into a particular employment by virtue of the order.

Decision of the Court of Appeal [1944] K. B. 390, affirmed.

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* *Present:* VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT and LORD SIMONDS.

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ALEXANDER
v.
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CO., LD.

APPEAL from the Court of Appeal.

The facts stated by VISCOUNT MAUGHAM were as follows: This action was brought by the appellants to recover damages under the Fatal Accidents Act, 1846, and under the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the deaths of Henry Alexander and Ernest Williams Andrews by an accident in a coal mine owned and managed by the respondents. Each of the appellants sued as the administratrix for one of the deceased. The two men were miners, aged sixty-three and sixty-two years, employed as repairers at the mine, and had been continuously employed at the mine for some thirty years. In the mine there was a straight main haulage road called Badham's Drift running south-west from near the pit-bottom in a gradient of about 1 in 18 downhill for nearly a mile, ending at the junction of Main Mead Vein and Badham's Level. Throughout this length there was a narrow haulage railway with only one pair of rails on which trucks or trams could be lowered by gravity down the incline, and pulled up again by a haulage engine near the pit-bottom. About 300 yards down the said incline there was a road which diverged to the east, known as No. 4 East Drift Road; and at the junction thereof with Badham's Drift there was a telephone and in addition the usual signalling wires. About 250 yards further down the said incline a level road caulled the Hydraulic Parting diverged to the west. The Hydraulic Parting and No. 4 East Drift were both haulage roads with rails. On September 5, 1942, at or about 5.30 in the morning, one Mantle, a fireman in the service of the respondents and in charge of the said district, ordered one Addis to take a tram, which had a bent axle, with a horse to draw it, from near the junction of Main Mead Vein and Badham's Level up Badham's Drift to the pit-bottom. This Addis began to do, and Mantle accompanied him. On the way Mantle ordered Alexander and Andrews to accompany Addis, and this they did, walking behind the defective tram. When Mantle, Addis, Alexander and Andrews and the defective tram arrived near the Hydraulic Parting, Addis stopped the tram and went forward to see whether there was a rope on the ground. If there had been, this would have meant that there was a train of trams which was or shortly would be coming up on its way to the pit-bottom. Addis told Mantle that there was no rope on the ground and Mantle then told him and Alexander and Andrews to proceed up Badham's Drift. In the meantime, a train of trucks or trams filled with rubbish had been pulled up

No. 4 East Drift by the stationary haulage engine. The man in charge, having adjusted the points, started the journey down the incline of Badham's Drift. At that hour main haulage was in operation and, as Mantle knew, trams were liable to be hauled up and down Badham's Drift and there was a system of telephones whereby Mantle could have warned the man in charge of the presence in Badham's Drift of Addis, Alexander and Andrews and the defective tram. It was the duty of Mantle to give the warning, but this he failed to do. Badham's Drift was in darkness and the defective tram made considerable noise, so that neither Addis nor the deceased were aware that the train of trams was approaching them. In consequence the train collided with the defective tram and Mantle, Alexander and Andrews were killed. It was not in dispute that Mantle was guilty of negligence and that the accident was thus occasioned. It was held by the learned trial judge (Singleton J.) that at the time of the accident Mantle was a fellow servant with Alexander and Andrews under the respondents and in common employment with each of them.

The appellants alleged (1.) that the deaths were caused by a breach by the respondents of s. 47 of the Coal Mines Act, 1911, and (2.) that their servant Mantle had been guilty of negligence. The respondents (1.) denied breach of statutory duty and (2.) relied on the doctrine of common employment. In answer to this defence the appellants relied on para. 4 of the Essential Work (Coalmining Industry) (No. 3) Order, 1941, to which the deceased workmen were subject, contending that by reason of the restrictions contained therein the defence of common employment was not open to the respondents. Singleton J. decided in favour of the respondents on both points. The Court of Appeal having affirmed this decision, the appellants appealed to the House of Lords.

Paull K.C. and *E. Ryder Richardson* for the appellants. The defective horse-drawn truck in that haulage road at that particular time constituted an obstruction within the provisions of s. 47 of the Coal Mines Act, 1911, and by causing or permitting this the respondents committed a breach of their statutory duty under that section. The Act distinguishes between travelling roads and haulage roads and there is no provision that travelling roads must be kept free of obstructions. The provision in s. 47 involves a prohibition of two sets of trucks being on the track at the same time. If on a railway a truck were drawn from a siding across the track of an express train, it would be properly called an obstruction in the natural use of words. So, if two sets of trucks are on a haulage road at the same time, one at least of them must constitute an obstruction. This horse-drawn truck was an obstruction throughout its unauthorized journey, since the respondents were under an obligation not to have an obstruction in the path of any vehicle properly on the track. The four men walking along without the truck would not have constituted an obstruction, nor could the horse; an obstruction must be some inanimate object. It is immaterial whether the obstruction is moving or stationary. If a truck can be an obstruction, there is no reason to exclude a moving truck. The mischief for which the common law did not provide and for which s. 47 provided, was the danger of not leaving a free passage along these dark roads. " Obstructions " are not confined to such objects as " pieces of coal." These are specifically referred to because they would most easily cause obstruction and also because otherwise it might have been thought that they were not obstructions. [They referred to *Attorney-General* v. *Heydon* (1) and *River Wear Commissioners* v. *Adamson* (2), and Maxwell on Interpretation of Statutes (8th ed.), p. 291.] The appellants are also entitled to rely on s. 102, sub-s. 8, of the Act. On the further point, the application of the doctrine of common employment depends on an implied term in the contract of employment whereby the workman is taken to say to his master: " If you will employ " reasonably careful and skilful persons to work with me, I " will accept the risk of their being negligent, provided I " always remain at liberty on proper notice to leave your " employment in the event of my not being satisfied with my " fellow workmen." This freedom to enter or to refuse to enter the employment, to remain in it or to leave it on proper notice, is essential for the applicability of the doctrine. Once this implied proviso fails the doctrine ceases to operate. The theory behind it is that a workman enters an employment knowing the risks to which he will be subject in it, on the footing that he is equally free to leave it. In the authorities the judges have constantly assumed this freedom and alluded to it: see *Priestley* v. *Fowler* (3); *Hutchinson* v. *York, Newcastle & Berwick Ry. Co.* (4); *Bartonshill Coal Co.* v. *Reid* (5);

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(1) (1584) 3 Co. Rep. 7a.
(2) (1877) 2 App. Cas. 743.
(3) (1837) 3 M. & W. 1, 6.
(4) (1850) 5 Ex. 343.
(5) (1858) 3 Macq. 266.

Bartonshill Coal Co. v. *McGuire* (1); *Smith* v. *Steele* (2); *Cribb* v. *Kynoch, Ld.* (3); *Young* v. *Hoffman Manufacturing Co., Ld.* (4); *Radcliffe* v. *Ribble Motor Services, Ld.* (5) and *Holdman* v. *Hamlyn* (6). As a result of the Essential Work (Coalmining Industry) (No. 3) Order, 1941, which applies to all collieries, the deceased could no longer leave their employment without permission from a national service officer. The position was altered to their detriment and, however much they might disapprove of fellow servants, whose conduct might expose them to risk, they were obliged to go on working with them. In the case of men then employed in the colliery, the effect of the order was not to put an end to their contract of service, or to make the doctrine of common employment permanently inapplicable to it, but that defence is not open to the respondents while the order remains in force. The order was made under the Emergency Powers (Defence) Act, 1939, which will end when it is not renewed (see s. 11). The order has not reversed the law on this point and when it is no longer in force the defence of common employment will once again be open to employers. Meanwhile, however, it is not available in this case, though otherwise, in view of the negligence of Mantle, it would have been open. While the order endures a man directed to work in a coal mine against his will might well refuse to enter into any contract of service and reject any implied contract, relying only on his statutory rights.

Long K.C. and *A. A. Warren* for the respondents were not called on to argue.

The House took time for consideration.

June 25. Viscount Maugham. My Lords, two points were raised on the trial of the action and are raised on this appeal. The first is the contention of the appellants that the deaths were caused by a breach by the respondents of the provisions of s. 47 of the Coal Mines Act, 1911, which is in these terms:—"Every haulage road shall be kept clear as far as "possible of pieces of coal and other obstructions." The second is raised by the defence of common employment set up by the respondents. The appellants, in answer to this defence, rely on an order made by the Minister of Labour under regs. 58A and 98 of the Defence (General) Regulations, 1939, which is entitled the Essential Work (Coalmining Industry) (No. 3) Order, 1941. Paragraph 4 of that order has a marginal note: "Provisions as to employment in scheduled undertakings." It is agreed that this is a scheduled undertaking, and that both the men who were killed were persons who were subject to this order. Paragraph 4 reads as follows: "Subject as hereinafter "provided, where a person carries on a scheduled undertaking "the following provisions shall apply: (*a*) the person carrying "on the undertaking shall not terminate (except for serious "misconduct) the employment in the undertaking of any person "employed therein, or without terminating such employment "cause him to give his services in some other undertaking "(except in case of emergency for a period not exceeding "fourteen days), except with the permission in writing of a "national service officer; (*b*) a person employed in the under-"taking shall not leave his employment except with such "permission as aforesaid." That is to say a person employed as Alexander and Andrews were employed could not leave his employment except with the permission in writing of a national service officer. The order makes no reference to such a matter as the liability of the employer for accidents to workmen or to the rule as to common employment. It is a temporary war-time regulation intended to increase the production of the scheduled undertakings, and it will cease to have validity in due course. It is in reliance on this order that the appellants contend that the defence of common employment is not open to the respondents in regard to the negligence of Mantle, because at the time of the said negligence the liberty of each of them, Alexander and Andrews, to leave his employment under the respondents, was restricted by the provisions of the order. It was conceded by the appellants that but for the effect of the order the respondents were entitled to rely and succeed on the defence of "common employment," in so far as the appellants' claims were based on the negligence of Mantle and not based on any breach of statutory duty by the respondents. By his judgment Singleton J. decided both these points in favour of the respondents, that is, that the respondents had not been guilty of a breach of the provisions of s. 47 of the Coal Mines Act, 1911, and that the defence of common employment was open to them notwithstanding the terms of the order. The appeal was heard by the Court of Appeal (Scott, Goddard and du Parcq L.JJ.) and was dismissed by a majority of the court on March 17, 1944. All the Lords Justices held that the respondents were entitled to succeed on the defence of common employment, in so far as the appellants' claims were based on the negligence of Mantle and not based on any breach of statutory duty. Goddard and du Parcq L.JJ. also held that the respondents had not been guilty of any breach of the provisions of s. 47 of the Coal Mines Act, 1911. Scott L.J., however, held that the respondents had been guilty of a breach of those provisions of, and further were not relieved of liability by the provisions of sub-s. 8, of s. 102 of the said Act.

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(1) (1858) 3 Macq. 300.

(2) (1875) L. R. 10 Q. B. 125, 129.

(3) [1907] 2 K. B. 548.

(4) Ibid. 646.

(5) [1939] A. C. 215.

(6) [1943] K. B. 664, 667.

My Lords, I will deal first with the question arising under s. 47 of the Coal Mines Act, 1911. The section is contained in Part II. of the Act described as relating to "Provisions as to "Safety." Those sections contain elaborate provisions as to ventilation, safety lamps, shafts and winding apparatus, and (ss. 42 to 48) travelling roads and haulage, and a number of other provisions designed as far as possible to secure the safe working of mines of coal and ironstone. The haulage roads dealt with in the Act might be worked by gravity or mechanical power or by horses or other animals. (See the terms of ss. 43, 44 and 45.) Vehicles using the road might of course be travelling in either direction although there might be (and is in this case) only one pair of rails; and under s. 43, sub-s. 1, it is agreed that miners and others might use a road of the width of Badham's Drift, their safety being secured by refuge holes (s. 44). It is to be noted that there is a provision (s. 48) requiring means of "communicating distinct and definite "signals" between all regular stopping places and the ends of the road. Failure to comply with any of these provisions is an offence against the Act (s. 75). Penalties are imposed by s. 101. My Lords, the sections, as I have mentioned, show clearly that haulage roads are intended to be used by vehicles and persons travelling in both directions. If a tub or a tram used for the normal purposes of the mine is "an obstruction" within s. 47, it would seem to follow that "as far as possible" it should not be allowed on the road—which is absurd. The appellants' argument that the defective horse-drawn tram under the care of Addis was an obstruction would seem to require the section to be read as if some words were added by implication to show that vehicles would not be within the section unless there were other vehicles travelling in an opposite direction on the same line. This would not be a legitimate addition to a penal section.

Pieces of coal or a baulk of timber would be obstructions at any time to all kinds of traffic along the road. The case of trams used to transport coal or stone or persons is entirely different, and danger from such traffic is more appropriately guarded against by provisions for proper signalling under s. 48. The section in my opinion is not a traffic regulation at all. It is primarily directed to the state of the haulage way and the lines upon it, and is designed to secure that they shall continuously be kept clear for traffic in either direction. I therefore agree with the way the matter is stated in the Court of Appeal. I do not, however, think that the ejusdem generis rule is applicable here; for it is easy to think of obstructions which are not in any reasonable sense of the same genus as pieces of coal. I would prefer to say that on the true construction of the section, the presence on the line of tubs or other vehicles for the purpose of working the mine is being contemplated as normal, and accordingly that vehicles so employed are not within the scope or meaning of the words " other obstructions " as used in that section. I have carefully considered the contrary view expressed by Scott L.J. but I find myself unable to agree with it. I do not feel it necessary to express an opinion on the question which might arise if a vehicle was temporarily not being used for the traffic of the mine and was left unattended on the rails; but I think it would not be difficult to distinguish that case from the present one.

The question whether the doctrine of common employment (which I shall call the rule) is open to the respondents is plainly one of very far-reaching importance. It is important on the present appeal to bear in mind that both Alexander and Andrews had entered the service of the respondents many years before any war legislation. The terms of their contracts of employment must clearly be ascertained in relation to the circumstances that either existed or were in contemplation at that time. Mr. Paull in his able argument for the appellants realized this, and contended, without any sacrifice of logic, that the implication of the rule is always based or conditioned on the freedom of the workman to enter or decline to enter a particular employment and to leave it on proper notice in the event of his not being satisfied of the skill and care exercised by his fellow workmen. It must follow, he said, that the rule can in effect be stated as if the workman had said to the master on entering his service: " If you the master will employ reasonably skilful " and careful persons to work with me, I will accept the risk of "their being negligent, provided that I am always to be at "liberty on proper notice to leave your employment in the "event of my not being satisfied with my fellow workmen." In support of this contention Mr. Paull referred us to a number of cases in which the rule of common employment has been laid down beginning with the decision in *Priestley* v. *Fowler* (1), discussed in detail in the independent decision of *Hutchinson* v. *York, Newcastle & Berwick Ry. Co.* (2), and finally approved in 1858 by the House of Lords in *Bartonshill Coal Co.* v. *Reid* (3), and in *Bartonshill Coal Co.* v. *McGuire* (4). Those decisions were followed in *Wilson* v. *Merry* (5), and in many other cases. My Lords, I think the rule as it has finally emerged is excellently stated in Salmond on Torts, 9th ed., p. 107. He begins by citing a well known passage from Lord Cranworth's statement of the general principle in *Bartonshill Coal Co.* v. *Reid* (6), in the following terms :—"When several workmen engage to serve "a master in a common work, they know, or ought to know, "the risks to which they are exposing themselves, including "the risks of carelessness, against which their employer cannot "secure them, and they must be supposed to contract with "reference to such risks." The learned writer continues : "The rule, that is to say, is an application of the maxim "volenti non fit injuria. This presumption that a servant "agrees to take upon himself the risk of his fellow-servants' "negligence is, however, not a mere presumption of fact, as in "other cases in which the maxim is applied ; it is a presumption "of law, which can be excluded by nothing less than an express "agreement between master and man by which the master "forgoes the benefit of it. The rule applies even though the "servant injured is a child." This passage from Salmond on Torts has had the approval of Scrutton L.J. in his elaborate judgment in *Fanton* v. *Denville* (7). Lord Cranworth's statement of the law was cited and accepted as correct by Lord Cairns L.C. in *Wilson* v. *Merry* (8), and has been followed in many cases ; but I will refer only to one other, a recent decision of this House. In the case of *Radcliffe* v. *Ribble Motor Services Ld.* (9), Lord Atkin delivered the leading judgment and after giving a short account of the history of the rule he observed that Lord Cranworth had given in the passage above quoted what is "now accepted as the true basis of the rule." With that view I think all your Lordships agree. It is important to note that Lord Cranworth bases the rule, which must now be taken to be a rule or presumption of law relating to contracts between master and servant, mainly on the two grounds, on the one hand that the servant knows or ought to know the risks, including the risks of carelessness by fellow workmen, and on the other that the master cannot secure him against these risks. Lord Cranworth says nothing about the right of the workmen to leave the employment of the master if he thinks that he is exposed to risks from rash or unskilful fellow servants. It is true that this has been mentioned again and again, especially in the older cases; but I do not think the observation is anything more than an attempt to show that generally speaking the rule is not unfair to the workmen. If it were to be regarded as an essential condition of the rule being applicable, it would, I think, be necessary to deal with the cases of employments which cannot be terminated by the workman except by the giving of a lengthy notice. To give two examples, the case of a seaman signing on for a lengthy voyage would have to be considered, and also the case of an apprentice for a number of years if the contract is mainly one of service. In the very numerous reported decisions relating to the application of the rule your Lordships have not been referred to any in which it has been held that the rule was inapplicable on the ground that the freedom of the workman to leave the employment was for some reason suspended. I do not think it can be correct to say that the rule, well settled as it now is, must be regarded as being essentially based upon the continuing freedom of the workman to leave the employment. It was not contended by the appellants that the effect of the Minister's order was to put an end to the contracts of service of the workmen then employed in the undertaking. Those contracts clearly continued in force, and they do not purport to be varied by the order (if indeed that was competent to the Minister) so far as regards the liability of the employers. The appellants in the present case have to persuade your Lordships that the contracts of service entered into by the two workmen, though it must be admitted that they included, as a presumption of law, the rule as to common employment, must be held to be subject to an implied term or proviso that the rule would continue applicable only so long as the workmen continued to have the right to leave the employment on giving proper notice. Such a term could be implied only if it could be shown to be reasonably necessary so to do in order to carry out the true bargain between the parties. That cannot, in my view, be established in the present appeal. My Lords, I have already noted that in the present cases the workmen, so far from being directed to the particular employment in which they were engaged at the date of the accident, had been in the service of the respondents for many years before the Essential Work Order came into force. It is only with those facts that we are dealing. I do not think it would be prudent for this House to express an opinion on the very important question whether the result would be the same in the case of workmen who were directed to an employment under the Essential Work Order. In such a state of facts the contract of employment would not be voluntary on the part of the workmen and an argument to exclude or modify the usual rule might take a very different form from that which Mr. Paull has felt himself able to adopt on the present appeal. I do not propose to express any view one way or the other as to the result of an appeal if such a case were to come before the House.

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(1) 3 M. & W. 1.

(2) 5 Ex. 343.

(3) 3 Macq. 266.

(4) Ibid. 300.

(5) (1868) L. R. 1 H. L. (Sc.) 326.

(6) 3 Macq. 266, 295.

(7) [1932] 2 K. B. 309, 325.

(8) L. R. 1 H. L. (Sc.) 326, 330, 331.

(9) [1939] A. C. 215, 227.

For the reasons above stated I have come to the conclusion that the learned trial judge and the Court of Appeal were right in their decisions on the two points raised on the appeal. It must therefore be dismissed with the usual consequences as to costs.

LORD RUSSELL OF KILLOWEN. My Lords, having had the opportunity of reading and considering the opinions prepared by my noble and learned friends Lord Maugham and Lord Simonds, I find myself unable to suggest any further reasons why we should dismiss this appeal. I will only say, on my own behalf, that I cannot believe that s. 47 of the Coal Mines Act, 1911, envisages as an obstruction of a haulage road a vehicle which has been constructed for the purpose of running on the haulage road, and which is engaged on the purpose for which it was constructed.

LORD MACMILLAN. My Lords, I concur.

LORD WRIGHT. My Lords, two separate issues are here raised. One is whether the fatal accident in respect of which the appellants bring their action was caused by a breach by the respondents of their statutory obligation under s. 47 of the Coal

Mines Act, 1911; the other is whether the respondents are excused from responsibility by reason of the doctrine of common employment. I shall accordingly first state my opinion on the construction of s. 47. That section is brief; it is as follows: "Every haulage road shall be kept clear as far as possible of "pieces of coal and other obstructions." Subject to the limitations conveyed by the words "as far as possible" and to the similar limitation contained in s. 102, sub-s. 8, of the Act, the obligation is unqualified. The respondents could not excuse themselves on the ground that the accident was due to the negligence of a fellow servant. But I do not think that the case falls within the section. The damaged tram which was being drawn by a horse up the haulage road did not in my opinion constitute an obstruction such as the section provides for. The governing word is "obstruction." The reference to "pieces "of coal" is by way of illustration and indicates the sort of thing which the legislature had in mind. I think the primary idea is that of something stationary, which is left on the road out of the ordinary course of things, such as baulks of timber, or stones or pieces of coal which have no proper place on a road. The word "obstruction" seems to me singularly inappropriate to the case of a vehicle being pulled by a horse up the line for a legitimate purpose in connexion with the working of the pit. The trouble was that owing to the mistake and negligence on the part of the foreman, who was in charge of the district, he did not warn by telephone the men in control and management of the road that the damaged tram was proceeding up it, with the result that the men started a journey of trucks down the road. The journey ran into the broken tram and killed the horse and the two men. But I do not think that the moving tram was an obstruction within the meaning of the section. Except for the failure to exercise due control of the traffic, nothing would have been out of order. There was no more reason to describe the horse-drawn tram as an obstruction than the moving journey. Each in a sense obstructed the other, but in ordinary parlance neither would be called an obstruction. The accident would be described as a traffic accident between two vehicles each moving on a road on which it was meant to move, so long as the road control did not let them go in different directions on the single line at the same time. This conclusion is strengthened by the references to pieces of coal. These are things which have no right to be left on the road. They are completely out of place. I put the stress of my opinion on the word "obstruc-

"tion." I do not think that this is a case of applying the ejusdem generis rule. Not only is there no genus, but the frame of the sentence emphasizes that the pieces of coal are merely meant to illustrate what is meant by obstruction.

I am of opinion that the appellants fail in their claim based on s. 47 of the Coal Mines Act. They cannot succeed on the ground that the respondents committed a breach of an absolute statutory obligation. Their alternative claim for negligence at common law also fails, in my opinion, because it is met by the plea of common employment, the men who were killed and the man who was negligent being all engaged in the service of the same employers, the respondents. They were engaged in common work, involving exposure to the risk of the negligence of one affecting the others. The doctrine was very fully discussed by this House not so long ago in *Radcliffe* v. *Ribble Motor Services, Ld.* (1), and I need not now repeat what was said there. It is difficult to understand why a doctrine so severely attacked has survived so many years. It has, however, been strenuously argued here by Mr. Paull that it has no application. The colliery in question was a scheduled undertaking within the meaning of the Emergency Powers (Defence) Essential Work (Coalmining Industry) (No. 3) Order, 1941. Paragraph 4 (*b*) of that order provided that a person employed in such an undertaking should not leave his employment except with the permission in writing of a national service officer. It was contended that the essential condition of the application of the doctrine of common employment was the consent of the man to undergo the risk of the negligence of the men who were in common employment with him, and that the condition was not fulfilled where the man could not leave the employment of his free choice, but was compelled to continue in it unless he could get the permission of the national service officer to leave it. So stated in that bald way, the question raised is one of great importance, which during the period of the present emergency may apply to many millions of workers who are engaged on scheduled undertakings. But I do not think it necessary here to examine the question in its full scope, because it may, I think, be disposed of on a narrower basis. I shall accordingly abstain from discussing the broader question, and merely consider the more limited issue. The order did not come into force until December 18, 1941. Before that date both the men who were killed were serving in the employment of

(1) [1939] A. C. 215.

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the respondents, and they continued to do so up to and including the time of the accident. If the true view of the effect of the order was that it abrogated the doctrine of common employment there and then, in the case of men in continuous employment before and after the order came into force, it changed the character of the contract of employment in the vital respect that before the date of the order the contract was subject to the common employment rule, while after that date it was not so subject. Mr. Paull, very properly, shrank from contending that the order itself could so drastically change the conditions of an existing and operative contract. He accepted the current view established by the decisions of this House that the doctrine of common employment was based on an implied term in the contract of service and, whether it applied or not, must be looked for as at the moment when the man enters the employment. The theory or fiction, he argued, is that he voluntarily enters the employment knowing the risks to which he is to be subject, but that he does so on the footing that he is free to enter the employment and equally to leave it. When freedom to leave the employment is taken away, the position is changed to the detriment of the man. However much he may disapprove of the fellow servants whose conduct may expose him to the risk of injury, he is no longer free to leave of his own choice. He must go on working with fellow servants, however unsatisfactory to him. Such was the argument. Mr. Paull did not found his claim on the contract being changed as between man and employer, but on a further implied proviso which, he contended, attached to the original contract of employment; this proviso he submitted was to the effect that the man was only to be subject to the defence of common employment so long as he was free to choose with what fellow servants he should work, or continue to work, and so long as he was free to leave the employment in the event of his being dissatisfied with them. In the event of the failure of that condition the doctrine of common employment ceased to operate in his case, and if he were injured by a fellow servant's negligence, he could no longer be met by the plea of common employment. It is no doubt true that the doctrine is based on this freedom of choice (see, for instance, *Smith* v. *Steele* (1), and *Radcliffe* v. *Ribble Motor Services Ld.* (2)), but that looks to the date when the contract is entered into. It has never been suggested that such a change as is effected by the Essential

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(1) L. R. 10 Q. B. 125, 129.

(2) [1939] A. C. 215.

Work Order can have been in the contemplation of the parties. The implied term which the law has accepted is indeed theoretical and has little relation to fact, but I am not prepared to extend the theory or fiction beyond its present artificial and arbitrary limits. The new proviso which it is sought to introduce is too far removed from any conceivable contemplation of the parties. There is no authority for it. I agree with all the judges below that no reason is shown why the plea of common employment should not succeed.

LORD SIMONDS. My Lords, the facts of this case, which are not in dispute, have already been fully stated to your Lordships and need not be repeated by me. I propose to say only a few words on the two questions of law that have arisen.

The first question concerns the meaning and scope of s. 47 of the Coal Mines Act, 1911, which is in the following terms: "Every haulage road shall be kept clear as far as possible of "pieces of coal and other obstructions." The neat question is whether the haulage by animal power of a broken tram up the main haulage road known as Badham's Drift was a breach by the respondents of the statutory duty imposed on them by the section that I have cited. That it was per se a breach of such duty could not be contended, for it was not suggested that the broken tram must for ever remain where it lay or that it could be brought to the pit bottom by any other way, or that animal power was an improper method of haulage. It was therefore in the circumstances of its removal that the appellants were forced to find a breach of duty by the respondents. They therefore alleged that the presence of the broken tram at that particular time at that particular place was an "obstruction" of which the respondents were bound under s. 47 to keep the haulage road clear. But this is still an imperfect statement of the position: for the broken tram would not even at that time and place have been an "obstruction," if the proper precautions had been taken and communication maintained with the men in charge of the main haulage engine so as to ensure free passage along the haulage road from the turning marked on the plan "Hydraulic Parting" to the pit bottom. The appellants were in truth driven to the contention that if there was a collision between two trams, each of which was entitled to use the road subject to proper precautions, then one or both of them were obstructions within the meaning of s. 47. My Lords, I do not find it necessary to decide whether a broken down tram, if carelessly left in a haulage road, could be an "obstruction" within s. 47, but I agree with your Lordships in thinking that that word is wholly inappropriate to describe either of two trams which come into collision in the course of a journey properly undertaken by each of them if proper precautions are observed. In the present case, presumably, if negligence had been imputable to those in charge of the main haulage rather than to the fireman who has died, the "obstruction" would, on the appellants' argument, have consisted of the trams which were being sent down the road. It is, I think, clear that this is not a meaning which can be properly ascribed to the word "obstruction" in the relevant section. It is unnecessary to discuss whether there is room here for the application of the ejusdem generis rule of construction.

The second question of law is whether the claim by the appellants is excluded by the doctrine of common employment. I will state that doctrine by repeating the oft cited words of Blackburn J. (as he then was) in *Morgan* v. *Vale of Neath Ry. Co.* (1): "That principle I take to be that a servant who "engages for the performance of services for compensation, "does, as an implied part of the contract, take upon himself, "as between himself and his master, the natural risks and perils "incident to the performance of such services." This is the qualification which by the common law is imposed upon the common law rule "respondeat superior." The appellants would impose a qualification on this qualification. They would deny its applicability wherever the workman is not competent to leave his employer's service at his own free will, as if there were added to the principle as enunciated by Blackburn J. some such words as "provided he is at liberty to give notice to "leave, and, having given such notice, to leave his employment, "if and when he thinks fit." Then, assuming this to be the principle of law, they apply it to the present case by saying that the deceased workmen were by the Essential Work (Coalmining Industry) (No. 3) Order, 1941, precluded from leaving their employment except by permission of a national service officer, therefore the condition of the implied contract between them and their employer was not satisfied, and therefore they can rely on the unimpaired doctrine "respondeat superior."

My Lords, in my opinion there is no foundation for this qualification of the doctrine of common employment in relation to the wider doctrine "respondeat superior." It was candidly admitted by counsel for the appellants that no such qualification is anywhere stated in the numerous cases in which, since 1837, the doctrine has been discussed. But he finds justification for it in the not infrequent judicial allusions to the freedom of the workman to come and to go as part of the explanation of the doctrine. It is no doubt attractive to analyse and define a principle of law and to confine its application within the limits which analysis and definition appear to require. And if in the present case the reason for this principle were as precise and clear as is the principle itself, I should not be unwilling to seek to confine its application. But, my Lords, in 1837 Lord Abinger, whose judgment in *Priestley* v. *Fowler* (1) may be regarded as the first expression of this principle, was able to say that there was no precedent for the claim made in that case, i.e., for the claim that the master was vicariously responsible to his servant for the negligent act of a fellow servant, and this rule, extolled in one age and condemned in another, has been repeated again and again without even the suggestion that there lay in gremio judicum the qualification that it should not apply where the workman could not leave his employment at will. If indeed this qualification was imposed on the doctrine of common employment, I do not see why your Lordships should not attack the citadel of the master's vicarious responsibility. Is he to be responsible for the acts of those servants of whom he cannot, without permission of the national service officer, be rid, but rest under a new responsibility to his own servants because they cannot, if they would, be rid of him ? I do not think that your Lordships would be justified in refining upon either the principle or its qualification. There remains room enough, as such cases as *Radcliffe* v. *Ribble Motor Services Ld.* (2) show, for fine distinctions in determining who by reason of their work are engaged in " common employment," but it is not possible to qualify the principle by importing as a condition of its application the implied term that the workman shall be at liberty as he thinks fit to determine his employment.

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(1) (1864) 5 B. & S. 570, 578.

My Lords, the present case is one in which the workmen concerned voluntarily entered their employment long before any Essential Work Order was ever thought of and evinced no wish to leave it. It is to their case and to the question whether into their contract of service the suggested new term should be imported that I have confined my observations. If and when the case should arise of a workman being against his will sent

(1) 3 M. & W. 1, 5.

(2) [1939] A. C. 215.

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under the order to a service that he would otherwise have declined and of his saying in some such words as learned counsel suggested: "What I must do, I will do: but I make no "contract of service and reject any that might be implied," such a case may be considered on its merits. It is not that which this House has now to consider. I concur in the motion that this appeal should be dismissed.

THE HOUSE ordered that the parties having agreed that the compensation payable under the Workmen's Compensation Act, 1925, should be the sum of 300*l.* payable to each of the appellants, the said sums be paid into the Tredegar County Court, to be invested and administered on behalf of each of the said appellants in accordance with the provisions relating thereto.

Appeal dismissed.

Solicitors for appellants: *Theodore Goddard & Co., for T. S. Edwards & Son, Newport, Mon.*

Solicitors for respondents: *William A. Crump & Son, for Arthur J. Prosser, Cardiff.*

[PRIVY COUNCIL.]

J. C.*

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July 23.

PART CARGO *ex* M.V. GLENROY.

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE AND ADMIRALTY DIVISION (IN PRIZE).

Practice—Shipping—Prize—Costs.

In this appeal (ante p. 124) the judgment of the Board, delivered on March 7, allowed the appeal and directed that the decree of the Prize Court should be set aside with costs, and that the respondent should pay the costs of the appeal to the Privy Council.

On this motion *Sir Robert Aske K.C.* (*Gething* with him) asked on behalf of the respondent to the appeal—the successful

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* *Present:* LORD MACMILLAN, LORD PORTER, LORD SIMONDS and LORD GODDARD.

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claimant before the Prize Court—that he should not be directed to pay costs in the Prize Court. He said that according to settled practice in prize if the claimant's claim had been disallowed in the Prize Court no costs would have been allowed against the claimant, the settled practice being that where there is a claim to ship or goods costs are not allowed against the claimant unless he has been guilty of fraud or concealment, or where the claim is not bona fide, and matters of that kind: *The Asturian* (1), *The Den of Airlie* (2), and Digest of Cases in Prize Courts, by Hubert Hull, at p. 81.

J. V. Nesbitt, for the appellant in the appeal, agreed that generally speaking the practice was as stated, but said that in the *Prins Knud* (3) the Board ordered the Crown to pay costs both in the appeal and in the court below.

LORD MACMILLAN: Their Lordships' view is that the proper course here, which seems to be in accordance with general practice, is that there should be no costs in the court below, but that the costs of the appeal will stand as they are. There will be no order as to costs as far as this motion is concerned.

(1) (1916) 5 Ll. Pr. Cas., 1st series, 216, 221.

(2) (1917) 7 Ll. Pr. Cas., 1st series, 152, 158.

(3) [1942] A. C. 667.

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Jan. 15, 16, 17, 18, 22; *June* 20.

[HOUSE OF LORDS.]

HICKMAN AND OTHERS . . . APPELLANTS

AND

PEACEY AND OTHERS . . . . RESPONDENTS.

Administration—Survivorship—Presumption—Evidence of simultaneous death—Air-raid—Testators and legatees killed by same bomb—Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 184.

Four persons, two of whom had made wills benefiting some of the others, were killed by the explosion of a bomb bursting in a London dwelling-house in which they were and demolishing it so as to bury them in the ruins. There was no evidence to show whether any of the deceased had survived the others:—

Present: VISCOUNT SIMON L.C., LORD MACMILLAN, LORD WRIGHT, LORD PORTER and LORD SIMONDS.

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Held (per Lord Macmillan, Lord Porter and Lord Simonds, Viscount Simon L.C. and Lord Wright dissenting), that in the absence of such evidence they had died in circumstances rendering it uncertain which of them survived the other or others within the meaning of s. 184 of the Law of Property Act, 1925, and that accordingly in the administration of their estates by the executors of the respective wills the younger of the deceased should be deemed to have survived the elder.

An inference, drawn from the facts, that they died simultaneously would not make the section inapplicable and in any case would not be justified on the facts disclosed.

Decision of the Court of Appeal (sub nom. *In re Grosvenor. Peacey* v. *Grosvenor*) [1944] Ch. 138, reversed.

APPEAL from the Court of Appeal.

The facts were as follows: At about 6 p.m. on September 14, 1940, when the Battle of Britain was at its height, an air-raid warning sounded. At about 6.30 p.m., or a little after, a small house, No. 5, Upper Cheyne Row, Chelsea, was struck by a German high-explosive bomb which penetrated to the basement, not exploding until it got inside the house. In the basement there had been constructed a small air-raid shelter, strengthened by sand-bags and other structures. The exact area of the shelter room was not in evidence. At the time of the explosion five persons were in the house: (1.) Mrs. Mabel Edith Price-Jones, aged fifty-two, the occupier of the house; (2.) her daughter; (3.) Elizabeth Sarah Parke, aged seventy, the housekeeper of the two male persons next mentioned, who resided in another house close by, but who used the shelter at No. 5, Upper Cheyne Row, because they had no shelter in their own house; (4.) Randolph Lea Grosvenor, aged seventy-three the first testator; and (5.) his brother, Edward Moberley Grosvenor, aged sixty-six, the second testator. It was their regular or invariable practice whenever there was an air-raid alert to go down into the basement shelter. The house was completely shattered, being reduced to a heap of ruins, and all the five persons were killed and buried in the debris. The bodies were subsequently dug out of the wreckage, three on one day and two on the next. They were all mutilated to a greater or less degree and in some cases there was actual dismemberment. The faces were wholly unrecognizable. Two, however, could be identified as male and three as female. It was only possible to tell who the two males had been from articles found on them. The first testator (victim No. 4) by his will left property in which

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his brother (victim No. 5) would share, if the latter were one of his brothers " surviving at the date of my decease," and also the housekeeper (victim No. 3) if she survived him. Under the will of the second testator (victim No. 5) victims No. 1, No. 3 and No. 4 would benefit if they survived him. The first respondent, as one of the administrators with the will annexed of the first testator and as sole executor of the second testator, took out an originating summons asking (1.) whether the deaths of the persons in question, " which occurred when the premises " . . . . in which they were taking shelter together during an " air raid were destroyed . . . . by enemy action . . . . ought " by virtue of s. 184 of the Law of Property Act, 1925, to be " presumed to have occurred in order of seniority . . . . " and (2.) if not, whether, in the absence of survivorship of any of the four persons, all dispositions in favour of them in the two wills ought to be treated as having failed. The only evidence was contained in affidavits. No evidence was led on the action of blast from high explosives or its effect on the human body. Cohen J. held that the deaths were not proved to have been simultaneous and that the deceased must be presumed to have died in order of seniority. The Court of Appeal (Lord Greene M.R. and Goddard L.J., Luxmoore L.J. dissenting), inferring that at the time of the explosion all the persons in question were in the basement shelter and holding that their deaths were simultaneous, reversed this decision. The appellants, persons interested in the will of the second testator, appealed to the House of Lords. The respondents were the administrators with the will annexed of the first testator, the sole executor of the second testator and the only surviving brother of the testators.

Wynn Parry K.C. and *Fawell* for the appellants. The difficulty of proving that persons died simultaneously is so great that as a matter of law it is incapable of proof. To exclude the operation of s. 184 of the Law of Property Act, 1925, it is not sufficient that there should be a probability, however strong, that the persons concerned died simultaneously. The matter cannot be decided on the balance of probabilities. There must be demonstration and the matter must be affirmatively proved beyond all doubt. Willes J. in *Cooper* v. *Slade* (1), when he said that " preponderance of probability may constitute sufficient ground for a verdict," was not laying down a universal

(1) (1857) 6 H. L. C. 746, 772.

principle. He said "may" and was stating a possibility. Simultaneity of death may be a theoretical possibility, and may even occur in fact, and if it could be adequately established, s. 184 would doubtless not apply, but the degree of improbability is very great and it is actually incapable of proof. In such a case there must always remain a residuum of doubt as to the exact moment of death. In a case like the present even survivorship of any particular person may be incapable of proof and it is much more clear that simultaneity of death must be so too. It is easy to say that a person is in the state of being dead, for death is essentially a state, but it is impossible to say as a physiological fact when he entered that state. There is usually a margin of error, a period between the event which causes death and the time when it can be predicated with complete certainty that death has occurred. The cessation neither of breathing nor of the beating of the heart is conclusive, for both have been restored. There are no criteria on which a medical man could find simultaneity of death. The possibilities in such a case as this are either that A survived B or that B survived A, or that it is uncertain which survived the other, the equivalent of a Scottish verdict of Not Proven, unlike the possible result in an English criminal trial, confined to two alternatives. It was recognized by the legislature that simultaneity of death is incapable of proof, and s. 184 proceeds on the footing that deaths occur in sequence, though the order may be uncertain; its language negatives the suggestion that the legislature was contemplating simultaneous death as a possibility. If that had been intended it would have been easy to say so. Accordingly, where it cannot be shown that one person survived the other, the sequence of death must be uncertain and s. 184 applies. It applies not only to cases where the question is clearly one of order of survivorship but also to cases such as the present where the circumstances give rise to the question of simultaneous death. [They referred to *Underwood* v. *Wing* (1); *Wing* v. *Angrave* (2); *Drummond's Judicial Factor* v. *Lord Advocate* (3) and *Mason* v. *Mason* (4).] If it be held that simultaneity of death is capable of proof then that is only one element to be taken into consideration in the single inquiry contemplated by s. 184, which makes no reference to it expressis verbis. There might be circumstances in which

(1) (1855) 4 De G. M. & G. 633, 661.

(2) (1860) 8 H. L. C. 183.

(3) 1944 S. C. 298.

(4) (1816) 1 Mer. 308.

uncertainty of survivorship was sufficiently clear for the executors to distribute an estate without reference to the court. In cases in which it was not so clear they would apply to the court and the question of simultaneity would have to be considered. In the ensuing inquiry, once uncertainty was shown, the onus of proving simultaneity would be on those asserting it. It is a heavy onus since they must establish certainty. The word " uncertain " in s. 184, calls for a high degree of proof beyond all doubt. In the present case the evidence does not establish simultaneous death. There is no evidence as to the effects of blast and, though all the persons died instantaneously, they may have died consecutively. It may well be that some of them may not have been in the confined space of the shelter continuously. There is no evidence at what time the brothers got to the house or whether they had got to the shelter. They may have gone to the house at different times. Any one of these persons may have had to answer a call of nature. There is infinite room for speculation as to their movements. If they were not all in the shelter, that is fatal to the contention that they died simultaneously. One of them might have been killed by blast and another by falling masonry after an appreciable passage of time. All the bodies were not recovered on the same day and that is consistent with the possibility that all these persons were not in the same place. Cohen J. held that the deaths were not simultaneous and the Court of Appeal was not justified in reversing his finding of fact.

Fawell following. The legislature, as s. 184 indicates, proceeded on the footing that simultaneous death is not a matter which should be considered in a court of law as capable of proof, i.e., that no such question should be left to the determination of the courts. Regard must be had both to the matter that was intended to be remedied and to the remedy provided. *Wing* v. *Angrave* (1) laid down the principle that there was no presumption of survivorship, from which it followed that if two testators died in a common calamity, each having by his will conferred a benefit on the other, neither could be held to have taken a benefit and the estate had to be administered as if they died together. That was likewise the result arrived at in the Scots case of *Drummond's Judicial Factor v. Lord Advocate* (2). So if A, having conferred a benefit by his will on B, died with him in a common calamity, the only question to be decided was whether B survived A, not whether they died simultaneously. If B's survivorship could not be established A's estate would be administered as if they had died simultaneously. The only alternative to dying simultaneously is dying consecutively and so that must be the alternative intended by the legislature in s. 184, i.e., that in all cases there must be a consecutive order of death. The legislature then had to settle what that order should be and achieved that result by means of a presumption. Formerly such a case as this gave rise to a difficulty over joint tenancies and that was something which the legislature intended to correct and could only correct by proceeding on the footing that simultaneous death was to be ignored as a possibility. These circumstances, coupled with the framework of s. 184, indicate that that was the footing on which the legislature proceeded. It admittedly altered the old rule and it did so by prescribing in all cases an assumed order, the emphasis being on order. On another aspect of that matter, if there is uncertainty which of two persons survived the other, that can be met in one of three ways. The section does not apply if it is absolutely certain that A survived B, or again, if it is absolutely certain that B survived A, or if it is absolutely certain that they died simultaneously. The antithesis of uncertainty is certainty, which may arise in one of those three ways. But the language of s. 184 requires certainty, and it is not sufficient, to displace the operation of the statutory presumption, if the state of affairs is such that a jury could only reach a decision on a balance of probabilities. The same degree of certainty is required in the case of all three possibilities and it is a matter of absolute proof. The choice is between certainty and s. 184. The words "subject "to any order of the court" were put in because one of the objects of the Act was to facilitate the administration of estates. The legislature assumes that there are some cases when there is so much uncertainty that opinions may vary. If there is prima facie uncertainty the executors may proceed to administer on the footing of s. 184, but these words leave it open for persons interested to go to the court for its order.

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(1) 8 H. L. C. 183.

(2) 1944 S. C. 298.

Sir Walter Monckton K.C. and *Jopling* for the respondents. The appellants did not suggest that simultaneous death cannot occur. Once it is admitted that there may be simultaneous death there is nothing inherently impossible in establishing that A and B died simultaneously. It being possible as a matter of law for two or more persons to die simultaneously, the fact is capable of proof. It may be very difficult to define the passage from life to death but it is possible for a judge or jury to say when in the ordinary understanding of mankind a person died. The question is not as to the possibility of proof but as to its adequacy. Absolute proof is not required in such a case; a reasonable inference drawn from the preponderance of probability is enough: *Lancaster* v. *Blackwell Colliery Co., Ld.* (1). In estimating the preponderance of probability there may be cases where a reasonable man must find for the plaintiff or where he must find for the defendant, or where, if he reached either conclusion, it could not be said that he was wrong, or where on the evidence he could not find that either party had made out his case, i.e., where there was no evidence fit to be acted on. In all judicial decisions there must be a residuum of doubt (e.g., in determining the precise spot of the accident in a running-down case). There is always the possibility that subsequent facts may come to light which would have affected the decision. The requirements of judicial proof should not be confounded with those of scientific certainty. Simultaneous death can be established in law by showing that the persons in question were involved in a common calamity resulting in instantaneous death. If the knife of a double guillotine decapitated two men at one stroke, or if a shell burst in a trench between two soldiers standing close together, these would be cases of instantaneous and simultaneous death. In a race it is possible to hold that there has been a dead heat. It would be shocking to common sense to ignore these possibilities. In such cases the proper approach in a court of law is not to split hairs or entertain metaphysical distinctions but to look at the matter more broadly than to apply the test of minute scientific measurement. The authorities have recognized the possibility of judicially establishing simultaneous death: see *Bradshaw* v. *Toulmin* (2); *Taylor* v. *Diplock* (3); *Mason* v. *Mason* (4); *Underwood* v. *Wing* (5); *Wing* v. *Angrave* (6); and *In the Goods of Benyon* (7). Two things are required to bring s. 184 of the Act into operation. There must be uncertainty and it must be uncertainty as to the order of death. The case of simultaneous death is not covered, and if it is established the uncertainty is removed and the

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(1) (1919) 89 L. J. (K. B.) 609, 611.

(2) (1784) 2 Dick. 633.

(3) (1815) 2 Phillim. 261, 280.

(4) 1 Mer. 308, 313.

(5) 4 De G. M. & G. 633, 657, 659, 660.

(6) 8 H. L. C. 183, 198, 199, 209, 213, 221.

(7) [1901] P. 141.

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section does not operate. The court in such a case as this embarks on a single inquiry in which it can be found either that one of the persons survived the other or that they died simultaneously, or that it is uncertain in what order they died. The onus is on the appellants to establish uncertainty. "Uncertain" in s. 184 means incapable of being judicially ascertained: see *Wing* v. *Angrave* (1). It is impossible to explain the words "subject to any order of the court" in s. 184, save that they confer a discretion on the court. *In re Lindop. Lee-Barber* v. *Lindop* (2) was wrongly decided on the facts. In the present case the question whether the persons concerned died simultaneously was one of fact which a jury would have answered affirmatively. That is the only reasonable conclusion to draw from the evidence. These persons must be inferred to have been in the shelter. That was the object with which the Grosvenors and their housekeeper went to the house. The mutilated and unrecognizable condition of the bodies indicates that they all died by the same means. This is quite different from the case of persons washed overboard in a shipwreck. The Court of Appeal was justified in reaching a different conclusion from Cohen J. An appellate court is engaged on a rehearing. If the court below has been guided to its decision by oral testimony, an appellate court is slow to differ from the judge below on a finding of fact, when questions of veracity and credibility are involved. Here, however, the facts are undisputed and the only question is the proper inference to be drawn from them. The Court of Appeal was in as good a position to decide that as the trial judge: see *Montgomerie & Co., Ld.* v. *Wallace-James* (3); *Dominion Trust Co.* v. *New York Life Insurance Co.* (4); *Mersey Docks and Harbour Board* v. *Proctor* (5) and *Powell* v. *Streatham Manor Nursing Home* (6).

Jopling following. The onus of proof is on the person seeking to take advantage of the statute to show that there is uncertainty, i.e. that it cannot be said with certainty that the deaths occurred in a particular order or that they were coincident. This is plain on the language of s. 184. The relevant facts must be examined in a single inquiry and uncertainty only arises if on the preponderance of probability it cannot be said that the deaths were simultaneous or that they took place in a

(1) 8 H. L. C. 183, 198, 206, 207

(2) [1942] Ch. 377, 381.

(3) [1904] A. C. 73, 75, 82, 83.

(4) [1919] A. C. 254, 257.

(5) [1923] A. C. 253, 258.

(6) [1935] A. C. 243, 253, 255, 263, 267.

particular order. Once this is made certain on the preponderance of probability the uncertainty contemplated by s. 184 does not arise. The same standards of proof must be applied to the questions both of successive and simultaneous death. Presumptions are divided into conclusive and disputable. (Taylor on Evidence, 12th ed., para. 70.) The presumption in s. 184 is conclusive and comes into operation in certain circumstances. In the present case it does not come into operation as the evidence shows that all the persons were killed at one and the same moment.

Wynn Parry K.C. in reply. Though simultaneity of death is possible in theory and may be a fact, it is incapable of proof in a court of law. One of the reasons why it was found before the Act that survivorship could often not be established was that account had to be taken of seconds. So now the person asserting simultaneity of death must take account of instants of time. The strictness of proof imposed on a person asserting survivorship precludes any less strict degree of proof being allowed to a person who asserts simultaneity, so as to permit a decision on balance of probability. To do so would be to reject the standard set in the authorities. Nothing in the Act suggests that the degree of proof required in the case of survivorship was intended to be altered. If the language of a statute allows of two readings, one of which remedies a mischief while the other does not, the former, if it is permissible, should be adopted. The respondents' contention would lead to a fantastic result and from this point of view every consideration is against it. Formerly, if survivorship was not established administration proceeded as if the deaths had been simultaneous. Since the Act the presumption in s. 184 applies. It is not to be supposed that now for the first time it has become obligatory to inquire into the possibility of simultaneity of death, as a result of a section which abolished administration on the footing of simultaneity. Such a conclusion would shock common sense. The section has dealt with the whole problem intelligently, postulating that the only uncertainty is uncertainty of survivorship and laying down a rule to deal with it. On the facts, even if simultaneous death could be proved, it is not established in the present case. The problem of which part of the house the deceased were in is covered by a blanket of uncertainty which can never be removed. It is particularly significant that the bodies were dug out on different days.

THE HOUSE took time for consideration.

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June 20. VISCOUNT SIMON L.C. My Lords, this appeal raises an interesting and difficult point which has not hitherto been expressly decided. It discloses a striking difference of opinion, for Cohen J. in the first court and the late Luxmoore L.J. in the Court of Appeal took one view, in favour of the present appellants, whereas the majority of the Court of Appeal (Lord Greene M.R. and Goddard L.J.) took the opposite view. I regret to find that this difference of judicial conclusion will also appear in the opinions about to be delivered in this House.

At about 6.30 p.m. on September 14, 1940, when the Battle of Britain was at its height, a small house, No. 5, Upper Cheyne Row, Chelsea, was struck by a high explosive bomb, which penetrated to the basement. It is material to observe that the bomb did not explode until it got inside the house—the Master of the Rolls inferred from the evidence, and I think that the inference was perfectly justified, that it exploded in the basement. The destructive power of such a bomb and of the blast produced by its explosion are, of course, enormous. In the basement there had been constructed a small air-raid shelter, strengthened by sandbags and other structures, and I agree with the Master of the Rolls that the evidence, which was on affidavit, justified the conclusion that there were at the time of the explosion five persons in the shelter. The Master of the Rolls and Goddard L.J. both reached the conclusion that the correct, and indeed the only proper, inference to draw from the facts proved was that all the persons concerned died simultaneously. This conclusion is challenged, and I must return to examine it, but it is convenient first to set out the reason why such a conclusion is vital to the respondents' success. The " first testator " (victim No. (4)) by his last will left property in which his brother (victim No. (5)) would share if the latter were one of his brothers " surviving at the date of my decease," and also the housekeeper (No. (3)) if she survived him. Under the will of the " second testator " (victim No. (5)) victims Nos (1), (3) and (4) would benefit if they survived No. (5). If, therefore, the persons concerned died simultaneously, these legacies all failed, for the legatee in each instance would not survive the testator, and (apart from special provisions which do not exist in this case) proof of this survival is essential if the legacies are to take effect.

It is evident that the failure of a claimant to prove affirmatively that the person upon whom his title depends

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survived the testator might arise in either of two ways. He may fail because (as the majority of the Court of Appeal in this case held) the two died at the same time, or because, although they died in succession, it is uncertain which of them survived the other. The second of these alternatives was the one which has frequently arisen in the past, and it has sometimes given rise to controversy and litigation. Accordingly, s. 184 of the Law of Property Act, 1925, enacted—" In all cases where, after the " commencement of this Act, two or more persons have died in " circumstances rendering it uncertain which of them survived " the other or others, such deaths shall (subject to any order of " the court), for all purposes affecting the title to property, be " presumed to have occurred in order of seniority, and " accordingly the younger shall be deemed to have survived " the elder." The interpretation of this section (save as to the words in brackets, which are very obscure but do not affect the present case) seems to me to be clear. The section establishes a presumption as to the order of a series of deaths when the deaths have arisen in circumstances which render it uncertain which of two or more persons survived the other or others. Before the statute there was no presumption in English law, and by the law of Scotland there is no presumption to this day (*Drummond's Judicial Factor* v. *Lord Advocate* (1)). The condition which must be fulfilled if the presumption is to apply at all is that there should be a survival of one person beyond the death of another, but that it should be uncertain which was the survivor. So far as the language of the section goes, it seems to me to be manifest that the section does not apply to the case (if such a case is possible, and is proved) where two or more deaths are absolutely simultaneous. Indeed, Mr. Wynn-Parry in his carefully framed argument for the appellants expressly said that he was not contending that if it were adequately proved that deaths were simultaneous, the section would apply. The section, he readily conceded, deals with a succession of deaths and does not deal with simultaneous deaths.

It is to be observed that, whatever may be the case in similar provisions in the Roman law, s. 184 is not limited to multiple deaths arising out of a " common disaster." For example, if a husband goes a long voyage and the ship completely disappears in circumstances where his death has to be presumed to have occurred, but there is no material to indicate on what date he

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(1) 1944 S. C. 298.

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was drowned, and if his wife was in a nursing home when he started and subsequently died under an operation, there may be absolutely no means of ascertaining which of them died first. Yet in such a case there is no "common disaster" at all. It is therefore a useful provision of the statute law which requires the question of survivorship in such a case, which otherwise remains insoluble, to be determined by asking which of them was the younger. No one in such an instance would suggest that there were grounds for believing that they both died at the same moment of time. But it is in connexion with a "common disaster" that these problems more usually present themselves. If A and B are swept off the deck of a ship by the same wave in a storm and both are drowned, there is usually no material which would justify the conclusion that they both died at exactly the same instant; there may sometimes be sufficient proof that A survived B, e.g., if B was not able to swim and was seen to sink at once whereas A was a fine swimmer who could be observed holding his own for a considerable time. In such a case there would be no uncertainty as to who was the survivor, and there would be no justification for applying the section. If, however, the facts do not enable a conclusion to be reached as to which of them survived the other, while the circumstances do not justify the conclusion that they both died at the same moment, then the section operates to establish a conventional order of succession.

Something was said in the course of the argument as to the maxim that in order to arrive at the real meaning of a statute it is legitimate to consider what was the mischief or defect for which the previous law had not provided. This proposition is derived from Coke C.J.'s report of *Attorney-General* v. *Heydon* (1). There is no doubt that, within its proper range, this rule of interpretation is still valid. "In order properly to "interpret any statute" said Lord Lindley M.R. in *In re Mayfair Property Co. Bartlett* v. *Mayfair Property Co.* (2), "it is as necessary now as it was when Lord Coke reported "*Heydon's* case (1) to consider how the law stood when the "statute to be construed was passed, what the mischief was "for which the old law did not provide, and the remedy pro-"vided by the statute to cure that mischief." But this maxim has a valuable application only when the language of the statute which is being construed needs to have this additional light thrown upon it. The words we are considering do not in

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(1) (1584) 3 Co. Rep. 7a, 7b.

(2) [1898] 2 Ch. 28, 35.

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my opinion leave any doubt as to what they say and mean. Moreover, in order to make a useful application of the maxim it is first necessary to be certain what the previous mischief was. So far as I know, previous cases which may have been thought to call for this statutory alteration were all cases where there was a succession of deaths, but it was impossible to ascertain which was the survivor. This, therefore, was the so-called mischief and it is this situation with which the section clearly deals. I cannot agree with Mr. Wynn Parry's submission that the form of the section shows that Parliament recognized the proposition that proof of simultaneous deaths is impossible. This would be to attribute to the legislature conclusions as to a problem of considerable refinement in the realm of physics and philosophy which I hardly think the two Houses can be expected to have studied and inferentially pronounced upon. The circumstance that Parliament provides for what is to happen if one condition is fulfilled is no reason at all for saying that Parliament has impliedly expressed the view that another and different condition can never arise. A rule of racing which provided that, where the judge was uncertain which of two horses passed the winning post first, the younger horse should take the prize, would not prevent the sharing of the prize in a dead-heat.

In passing, I venture to suggest, though without any great degree of confidence, an interpretation of the obscure words in brackets which differs from any of those thrown out in previous judgments, so far as I have seen them. The section lays it down that the rule which it embodies is to apply " (subject to any " order of the court)." No entirely satisfactory interpretation of these words has, I think, ever been put forward. May it be that they were intended to provide for a case where sufficient evidence as to the respective ages of the deceased persons was not forthcoming ? There must be many instances where this information could not be ascertained with precision, and in such cases the order of the judge, directed to the probabilities of the case, might be contemplated. But, even if there is any merit in this explanation, the words used have not been happily chosen for the purpose. However, the interpretation of the parenthesis is of no importance in the present appeal and, as I have already said, I regard the interpretation of the rest of the section as quite clear. There is no justification for reading into the section a second alternative condition which is not there, to the effect that the conventional order of survivorship also applies "in circumstances where the proper inference is that "they died at the same time." The view which I take of the limited application of the section is the view expressed not only by Lord Greene and Goddard L.J., but also by Luxmoore L.J., who dissented in the ultimate conclusion.

There thus remain three questions which must be answered in determining this appeal. If any one of them should be answered in the negative, the appeal must succeed. These three questions are (1.) *Can* two or more persons die at the same time? (2.) Can it be *proved* in a court of law that two or more persons died at the same time? (3.) In the present case, is the proper conclusion on the evidence that the two testators and their beneficiaries in the shelter died at the same time?

(1.) The view has been advanced in the course of the argument that simultaneous deaths are impossible, and this is said to be in some way related to the infinite divisibility of time. The mathematical theory of infinitesimals is a difficult topic which I feel ill-qualified to expound. Modern science does not, I believe, dispute that time is infinitely divisible and I am prepared, with due humility, to assume it—but without dogmatism, bearing in mind that my distinguished predecessor, Lord Campbell L.C., eighty-five years ago, in *Wing* v. *Angrave* (1) rashly assumed that matter is infinitely divisible, a proposition which, so far as I know, modern physicists would not affirm. But even so, I do not think that either the scientific view or the legal view would insist that in the nature of things no two deaths can ever occur at the same time. Death, I suppose, may be a process rather than an instantaneous event, and although modern mathematical science, as I understand, teaches that if two events are to be absolutely simultaneous, they must occur not only at exactly the same instant but in exactly the same place, I am not disposed to introduce these refinements into the practical conclusions of a court of law and should not be prepared, for the present purpose, to proceed on the basis that no two deaths can ever coincide in time. Previous judicial pronouncements on such a point may not be of great value as precedents, but I may point out that the view that it is possible that two persons perished at the same moment is that entertained by Lord Thurlow L.C. in *Bradshaw* v. *Toulmin* (2); by Grant M.R. in *Mason* v. *Mason* (3); by Lord Wensleydale in *Wing* v. *Angrave* (4); and as "a highly improbable state of facts" by

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(1) 8 H. L. C. 183, 199.
(2) 2 Dick. 633.
(3) 1 Mer. 308, 313.
(4) 8 H. L. C. 183, 213.

Lord Chelmsford in the same case (1). Lord Cranworth left the possibility in doubt (2), but in the earlier case of *Underwood* v. *Wing* (3), said it was "hardly within the range of "imagination." These are mere dicta, but there seems to me to be no ground for assuming that the law does not recognize the possibility of simultaneous deaths.

(2.) Next comes the question whether it can be *proved* in a court of law that two persons died at the same time, so that neither survived the other? Here a sharp distinction must be drawn between reaching a correct conclusion in a court of law, and establishing an absolute scientific truth. A court of law, whether it takes the form of a judge sitting alone, or sitting with the help of a jury, is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it. In most cases, there is a contest, and the court merely has to decide between the parties. And in reaching its conclusion, the court is greatly helped by considering upon which party rests the burden of establishing its contention. The conclusion, therefore, that the party upon which the burden rests has not proved an essential proposition, leads to the result that for the purposes of that litigation the proposition is to be rejected—a course of reasoning which could never establish a positive truth of science. Some observations made during the hearing of this appeal seemed to imply that the standard of proof to establish simultaneous deaths is something of an entirely different order from the standard of proof required in other cases. I do not see why. On any view, the cases where two persons perish at exactly the same moment must be very unusual, though methods of wholesale instantaneous destruction have been much developed in the last five and a half years. But if the evidence is enough to justify the inference, the conclusion follows. Far-fetched hypotheses, unsupported by any semblance of evidence, e.g., that one of the victims may conceivably have started to leave the shelter, or may have died from natural causes, just before the bomb fell, do not seem to me to advance the matter. The use of the word "uncertain" in s. 184 is nothing to the point, for we are not engaged in applying the section, and in any case the uncertainty there referred to is uncertainty which is not removed by evidence leading to a defined and warranted conclusion. If nothing is to be held to be proved in a court of law when it is conceivable that another incident of which there is no evidence might reverse the conclusion, then decisions of fact based on circumstantial evidence—such as are frequently reached in criminal cases, or in the Divorce Court—would often have to be regarded as inadequately established. In my view, the right conclusion depends on the evidence, and on nothing else.

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(1) 8 H. L. C. 221.

(2) Ibid. 209.

(3) 4 De G. M. & G. 633, 661.

(3.) It is this last question, viz., whether the proper conclusion from the evidence is that the deaths occurred at the same time, which to my mind creates the main difficulty in the case. The Master of the Rolls and Goddard L.J. considered that the proper conclusion from the evidence (which was all on affidavit) was that the deaths were simultaneous. I agree with them. Goddard L.J. rightly points out (1.) that " it is undoubted law " that in civil proceedings a finding can, and may be, rested on " the probabilities of the case " and the citations which he makes from Willes J. and Dyer C.J. to support this are extremely relevant. If the issue came before a jury on these materials, I think that a properly instructed jury would reach the same conclusion as the majority of the Court of Appeal. Cohen J. took the other view, largely because he felt constrained to follow Bennett J. in *In re Lindop. Lee Barker* v. *Reynolds* (2) where the last-named judge quoted and relied upon Lord Cranworth's dictum as laying down that it was practically impossible for a court to hold that two persons died at the same moment of time. I have already given my reasons for thinking that this does not sufficiently recognize the function of a tribunal in dealing with the weight of evidence before it.

I conclude, therefore, that for the purpose of reaching a decision of fact in a legal tribunal, it ought not to be held to be impossible for two people to die at the same time. I recoil from the proposition that two soldiers standing shoulder to shoulder in the same trench when a high explosive shell drops between them and blows them both to smithereens, cannot rightly be held by a court of law to be proved to die at exactly the same moment. Where that conclusion is reached, it is not arrived at by ignoring small fractional differences in time, but by drawing the correct inference from the proved facts. I do not consider that the House should reverse the Court of Appeal unless it would set aside the verdict of a jury on the same evidence to the effect that the deaths were simultaneous. And this I should not be prepared to do. I would therefore dismiss the appeal.

(1) [1944] Ch. 138, 153.

(2) [1942] Ch. 377, 382, 383.

LORD MACMILLAN. My Lords, in this appeal your Lordships are called upon for the first time to consider the interpretation and application of an enactment which has introduced an entire novelty into the law of England. It first appeared in s. 107, sub-s. 3, of the Law of Property Act, 1922, and is now in identical terms embodied in s. 184 of the Law of Property Act, 1925. It reads as follows: " In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder." The problem with which the legislature has thus dealt has long been familiar to lawyers. Rights of succession, alike testate and intestate, depend on the survivance of one person by another. The living succeed to the dead. In the ordinary case there is no difficulty in ascertaining which of two persons died first. But in the vicissitudes of human life there occur instances in which, owing to the absence of any positive evidence, it is not possible to arrive at a conclusion and the matter is left in uncertainty. The most familiar case is where two or more persons meet their death in a common calamity, the case of commorientes, as lawyers designate it. Two or more persons perish together and there is no evidence to show which survived the other or others. Yet rights of high importance may depend thereon.

The Roman law provided a solution for the dilemma in certain cases by means of presumptions founded on what I may call biological considerations. Thus a grown up son is presumed to have survived his parent. Cum explorari non possit uter prior extinctus sit, humanius est credere filium diutius vixisse. Dig. Lib. XXXIV. Tit. V. De Rebus Dubiis. The presumption takes the place of proof. The topic has been discussed with much learning by continental jurists and is specifically dealt with in the Code Napoléon by means of detailed presumptions. For the continental law I may refer to Burge's Commentaries on Foreign and Colonial Laws, 1st ed., vol. IV., pp. 11-29. But, says Chancellor Kent in his Commentaries on American Law, " the English law has hitherto waived the question, and perhaps prudently abandoned as delusive all those ingenious and refined distinctions which have been raised on this vexed subject by the civilians " (14th ed., vol. II., p. 435).

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In the absence of any presumptions the English courts had to find some way of extricating the difficulty. What they did was to fall back on the principle that the plaintiff must prove his case—actori incumbit onus probandi. If a plaintiff's claim depended on showing that A survived B then the plaintiff must establish the fact affirmatively by evidence; if sufficient evidence was not forthcoming the claim failed: *In re Phené's Trusts* (1). This impotent conclusion was not a solution of the problem but rather an admission of its insolubility. Where the deceased persons had mutual claims to succeed the one to the other and there was no evidence that one survived the other, the fiction was adopted of holding that they died together at one and the same time: *In the Goods of Beynon* (2). This expedient of assuming the deaths to have occurred simultaneously did not proceed on any proof of the fact or on any presumption, but was merely a method of solving an otherwise insoluble problem which had to be solved somehow. Such a state of the law was far from satisfactory. The results which may follow from the absence of any aid from presumptions are well illustrated in a recent case in Scotland, where the common law remains as it was in England: *Drummond's Judicial Factor* v. *Lord Advocate* (3). In that case the whole savings of one of the victims of a calamity almost identical in its circumstances with that which this House has now under consideration were carried off by the Crown.

It was to remedy this imperfection of the law that the legislature came to the aid of the courts by enacting a statutory presumption in the terms which I have quoted. Unfortunately the wording of the section is such as to have given rise to controversy. Two views have been advanced as to its meaning and effect. According to one view, which is the view of Lord Greene M.R. and Goddard L.J., the statutory presumption is strictly limited in its application to cases in which "the "court is satisfied as to two things—one that the proper "inference from the circumstances is that the deaths took place "consecutively, the other, that the circumstances leave the "court in uncertainty as to which death took place first" (4). That is to say, all that the statute does is to fix artificially the order of sequence among consecutive deaths, where that order cannot in fact be ascertained. If the circumstances are such as to justify an inference that all the parties concerned died

(1) (1869) L. R. 5 Ch. 139.
(2) [1901] P. 141.
(3) 1944 S. C. 298.
(4) [1944] Ch. 138, 146.

simultaneously then the circumstances are not such as to render it uncertain which of them survived the other or others, for it is certain that none survived the other or others. This according to Goddard L.J. (1) is the literal construction of the plain words of the enactment. The other view is that when the circumstances are such that it cannot be ascertained that one of the deceased survived the other then the uncertainty which the section postulates exists and the statutory presumption applies. One reason why it cannot be ascertained that one survived the other may well be that the deaths occurred so closely in time that there is a high probability that they were practically simultaneous. I say "practically" for reasons which will appear later. Having carefully weighed the arguments in support of each of these rival constructions I pronounce unhesitatingly in favour of the latter. It would be indeed unfortunate if the former were to prevail. For one thing it would mean that the legislature had signally failed to provide any remedy for an admitted defect in the law in a large and unhappily increasing number of cases in which evidence that the victims died consecutively is not available. Having set out, as I think may be reasonably assumed, to remedy the law as to commorientes, or persons dying together, the legislature is ironically found not to have made any provision for the case of commorientes who die together but to have dealt only with persons proved to have died consecutively. In the next place I would observe that where two persons perish in a common calamity and there is no evidence as to which died first it is necessarily left uncertain whether they died consecutively or simultaneously, although the circumstances may point with high probability to their not having both died at the same moment. The operation of the statutory presumption is, in the view of the learned Master of the Rolls, made dependent on the ascertainment of a fact, namely, that the deaths were consecutive, which is itself necessarily conjectural in the absence of any positive evidence. The only case in which it can be demonstrated that the deaths were consecutive is where one of the persons concerned is proved to have been alive after the other is proved to have died: but in such a case there is no need for any presumption of survivorship. Nevertheless it is said that unless the court is satisfied that one of two victims of a common calamity survived the other the circumstances are not such as to render it uncertain which victim survived the other. I prefer to read the enactment as meaning that where the circumstances are such that it is not possible to say with certainty that one of the victims survived the other there is then uncertainty as to which survived the other. Clearly you cannot say with certainty that one of the victims survived the other if your belief is that both died at the same time, if that be possible. The decision of the Court of Appeal, if it were affirmed, would almost inevitably lead to every case having to come into court for determination of the obviously contentious and often really insoluble question whether the deaths were consecutive or simultaneous. The view of the learned Master of the Rolls involves two things, first, that it is possible by legal proof to demonstrate that two persons died at precisely the same moment of time and, second, that intentionally or inadvertently the legislature omitted to deal with this case. I gravely doubt whether the legislature envisaged as a practical consideration the existence of the possibility of simultaneous deaths. The draftsman in addressing himself to the formulation of this remedial enactment may be assumed to have read at least the leading case of *Underwood* v. *Wing* (1). There he would find at p. 661 this pronouncement by Lord Cranworth L.C.: " It " cannot be assumed to be proved, or probable, or possible, " that two human beings should cease to breathe at the same " moment of time, for that is hardly within the range of " imagination, and to adjudicate on such a principle would, " I think, be proceeding on false data, but the real ground to " proceed on is that it cannot be proved which died first." It is easy to involve oneself in logical and metaphysical subtleties, and perhaps fallacies, in handling such a topic as this. It is true that time is infinitely divisible and also that it is theoretically possible that the deaths of two persons may be absolutely coincident in time. " This is, of course, a profound " and impressive truth," as Lord President Robertson once said in another context, and then proceeded to add " but there are " times and places for everything, and I should hardly have " thought a Tramway Act exactly the occasion which Parlia" ment would choose for teaching business men metaphysics " unawares ": *Edinburgh Street Tramways Co.* v. *Edinburgh Magistrates* (2). I prefer, therefore, to judge the language of the present enactment by a more commonplace standard. I think that it poses a practical question—Can you say for certain which of these two dead persons died first? If you

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(1) [1944] Ch. 152.

(1) 4 De G. M. & G. 633, 661. (2) (1894) 21 R. 688, 704.

cannot say for certain, then you must presume the older to have died first. It is immaterial that the reason for your inability to say for certain which died first is either because you think they both died simultaneously or because you think they died consecutively but you do not know in what sequence. I note with interest that the learned Master of the Rolls himself in the course of the argument in the Court of Appeal (1) "suggested that the section on its true construction might "cover the case of simultaneous deaths." The reasons which he gives for rejecting his suggestion do not, with all respect, convince me, despite their verbal logical cogency.

I would only add a few words regarding the term "un-"certain" which occurs in the enactment and which was so much canvassed in the course of the argument. The basis of belief may range from mere conjecture through all degrees of probability to absolute demonstration—possibility, probability, certainty. In seeking to arrive at a conclusion in fact in ordinary human affairs the law rejects mere possibility as an insufficient basis of proof, but on the other hand it does not exact absolute or mathematical proof. It is content to proceed on probability, if it is sufficient, and the test of sufficient probability is that the direct evidence, with all legitimate inferences, is such as ought to satisfy the mind of a person of reasonable intelligence. But the result of a decision on a question of fact by a judge or a jury is not certainty. It is finality, not certainty. Your Lordships in considering a verdict of a jury on a question of fact have often declared that it is not to be disturbed because there was evidence on which a reasonable person could so find but that it is not to be taken that your Lordships would have reached the same conclusion. Can it be said that in such circumstances the fact found by the jury has been ascertained with certainty? It has been determined with finality in law, but not with certainty in fact. In my opinion the legislature in employing the word "uncertain" in the section which the House has to construe was not thinking of the kind of certainty with which the law has to be content but was using the word in its ordinary acceptation as denoting a reasonable element of doubt.

So, coming at last to the facts of the present case so far as known, I put the question thus:—Can it be said for certain of any of the five persons involved in this tragic occurrence that one did or did not survive the other? All that is certain is that

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(1) [1944] Ch. 138, 145.

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a high explosive bomb fell on a small house, No. 5, Upper Cheyne Row, Chelsea, on September 14, 1940, about 6.30 o'clock, that it exploded within the house and reduced it to a heap of ruins, that five dead bodies, severely mutilated, were subsequently recovered from the debris, and that there was a shelter in the basement of the house to which the deceased were in the habit of resorting when there was an air raid. No technical evidence was led on the action of blast from high explosives or its effect on the human body. Now I do not for the purposes of my argument need to say that, if a judge or jury had to try the issue whether in these circumstances all the victims of the calamity perished at precisely the same instant, and were to find as a matter of fact that this was so, the finding would on appeal be set aside on the ground that there was no evidence on which a reasonable man could reach that conclusion—pace Lord Cranworth L.C., who thought that the simultaneous death of two human beings was insusceptible of proof. Two most eminent and most reasonable judges have so found in this case. But, with all respect, that is not an issue which the statute requires to be determined in order to bring it into operation or exclude its operation. All that is necessary, in order to invoke the statutory presumption, is the presence in the circumstances of an element of uncertainty as to which of the deceased survived the other or others. I can imagine a juryman saying " I really cannot answer this question. It may " be that they died one after the other or it may be that they all " died at the same moment, but in any case I cannot say for " certain which, if any, was the survivor." That is also my state of mind on the facts of the present case. Without resorting to fantastic or far-fetched conjectures it is perfectly possible that the blast of the explosion did not annihilate the whole of these five victims at the same instant. Thus, one of them may quite well have been out of the shelter in another part of the house at the moment of the impact of the shell and the blast, though by an infinitesimal interval, may have struck him sooner or later than the others. I simply do not know. Nobody can know. Where everything depends, as Lord Cranworth said in *Wing* v. *Angrave* (1), on " survivorship for a " second " I cannot accept the view that in the circumstances of this case there was no element of uncertainty, legal or other, on the cardinal issue.

My opinion accordingly is that the statutory presumption applies and that the appeal should be allowed.

(1) 8 H. L. C. 183, 207.

Lord Wright (read by Lord Porter). My Lords, in my opinion the decision in this appeal depends on a finding of fact. The question is whether the four persons who met their death when the enemy bomb exploded in the basement of the Chelsea house in which they were sheltering died at the same moment. This fact, in my judgment, is to be ascertained by the verdict of a jury or the decision of a judge of fact in the same way and by the same rules as to proof as any other disputed issue of fact. Arguments to the contrary that some special rule applies have been advanced on behalf of the appellants. I shall deal with them when I have explained why I agree with the findings of fact stated by the Master of the Rolls and Goddard L.J. (now Lord Goddard), with whose judgments I am in complete accord.

The issue of fact was one which might well have been tried in a common law court by a jury or a judge of fact. But as it involved the administration of the two wills of R. L. Grosvenor and E. M. Grosvenor respectively and also the rights of Elizabeth S. Parke and Mrs. Price-Jones as legatees under one or other of the wills, the proceeding was by way of originating summons, and the only evidence was contained in affidavits. Indeed, precise and detailed evidence was not possible. I adopt and agree with the words of Lord Goddard (1) " that all five " people were then actually in the shelter room is so highly " probable that, to my mind, it amounts to a certainty that " they were." The exact area of the shelter room is not given, but most jurymen and judges would have a rough, but sufficiently accurate, idea what it was. A few feet more or less would not matter. The affidavits show that the five persons were all in the building at the fatal moment. That seems to have been taken almost for granted in the courts below. Before this House remote and fanciful possibilities were suggested why one or more might have left the shelter. I proceed on the footing that all five were in fact in the shelter. When the high explosive bomb fell straight into the basement, " that all five " were killed at the same time seems to me to be a matter of " certainty," if I may once more adopt the words of Lord Goddard (1). Luxmoore L.J. (2) who dissented on this issue of fact, laid stress on the absence of the evidence of an expert who could speak with authority of the effect of bomb blast on human beings. If there is such an expert, his evidence might perhaps have helped the court and relieved this House of the necessity of deciding an appeal on mere evidence of fact. But no expert was called on either side. The judge of fact was left to exercise his knowledge and experience of the ordinary affairs of life, as a jury would have been. It may seem strange to future generations that such an event (or " incident," as such happenings are nowadays commonly called) should be described as ordinary, but so it is to those who have for five years lived in or near London, and I do not see what real help the hypothetical expert could have given the court. In any case, no such help was given. The court was left to decide. The court, then, is entitled to decide the question by applying such common sense and untechnical standards of the measurement of time as a plain man would adopt. Suppose the hypothetical plain man were cross-examined as to what he meant when he said that the five persons died at the same time, and were asked whether he meant within the same minute, or the same second, or what ? It may be he would reply that he was applying the smallest measurement of time of which he could take cognizance. This may not be very exact, but it is as exact as expressions like " the same moment," or " the twinkling of an eye " or " instantaneous " or " simultaneous " are in ordinary thought. Different language would be necessary to specify differences in measurement imperceptible to ordinary sense which might be recorded by scientific instruments of almost incredible delicacy. The hypothetical plain man would say that he knew nothing of such things. In the same way, it has been said that in legal proceedings cause and causation generally mean the " common " sense " cause, or what it would mean to the ordinary man. Thus the plain man might say that, if two persons were beheaded by a guillotine cutting both heads off by the same stroke, they both died at the same moment. Or this might be said if two persons were electrocuted in the same chair by the effect of the same current. It was not contended in this House that it was impossible that two deaths should be simultaneous. What was said was that it was so unlikely that only the strictest and most minutely conclusive evidence could justify such a finding of fact. But I cannot see why any special and peculiar rule of evidence should be demanded in these cases or why the ordinary requirement of evidence reasonably sufficient to satisfy a jury should not be applicable. I note that Lord Campbell L.C., in *Wing* v. *Angrave* (1), seems to treat the test as being whether there was " a clear preponderance of evidence to support the inference

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(1) [1944] Ch. 138, 153.

(2) Ibid. 150.

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(1) 8 H. L. C. 183, 199.

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"that the husband survived," which was the issue in that case. He described the issue as a pure question of fact, to be decided by what is the true inference on a clear preponderance. He desiderated no higher standard of certainty. It may be that cases in which this question arises are rare. Lord Greene M.R. well observes (1): "It is true that simultaneous deaths can "only occur in special circumstances, but, if the weight of "evidence points to the conclusion that the deaths were "simultaneous, I do not see why it should be said that the "court ought not to draw that conclusion because of the "existence of a remote possibility that it would be incorrect. "In the present case, the only possibility suggested is that one "or other of the persons concerned may have been struck and "killed by the falling bomb a fraction of a second before "it exploded. Anything is possible, but is it to be said that a "scintilla of a possibility of this sort is to prevent the court "from drawing the obvious inference as to what in fact "happened? I do not think so." This admirably expresses my own thought. The inquiry here is simply what is the proper inference from the facts. Five people are crowded in a small shelter. The high explosive bomb falls among them and explodes in that confined space. Can it be reasonably held to be uncertain that the effect on them all is not only fatal but instantaneous? To my mind that is the only proper inference. It cannot be forgotten how small a proportion of decisions of fact, either in the ordinary dealings of mankind or in the law courts, depend on tactual or aural or visual observation. Most cases depend on circumstantial evidence, that is, on the correct inference to be drawn from all the known facts. So I think it is in this case.

Before your Lordships there was a great deal of discussion which centred round s. 184 of the Law of Property Act, 1925, and on certain decisions. On the facts as I find them, the section has no application here because in my opinion the only condition in which the section applies is if "two or more "persons have died in circumstances rendering it uncertain "which of them survived the other or others, such deaths shall "(subject to any order of the court), for all purposes affecting "the title to property, be presumed to have occurred in order "of seniority, and accordingly the younger shall be deemed "to have survived the elder." I may note that in my opinion the bracketed words "(subject to any order of the court),"

(1) [1944] Ch. 138, 146.

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whatever they may mean, cannot displace or affect or contradict the plain meaning of the section, namely that in the event specified the presumption is to have effect ; I may also note in passing that if the section applied at all on the facts of this case it would in my opinion have affected the title to property, because if it applied it would affect the various dispositions of property under the wills. But I think that the section is not applicable unless there is uncertainty as to survivorship and in this case I am of opinion that there is no uncertainty because the proper finding of fact is that the persons died at the same moment. The possible contingencies are that the persons all died contemporaneously or that of the four persons one or other died before the other or others and that it cannot be ascertained what was the precise order of the deaths. In the latter event the section would have come into operation and the statutory presumption would have become applicable. The presumption had involved a change in the previous law. This House had held in *Wing's* case (1) that there was no presumption of law where two or more persons have perished in the same casualty either that they all died at the same time or that the order of their deaths was to be taken to have been according to considerations of age, sex or the like. Such presumptions had been and still are established by some foreign codes ; for instance, as Lord Campbell L.C. pointed out in *Wing's* case (2) by the Code Napoléon. But he went on to say " according to our jurisprudence, where the question arises, " which of two individuals, who perished by the same calamity, " survived, there is no inference of law from age or sex, and the " question is to be decided upon the circumstances proved in " each particular case." The Lord Chancellor had only in that case to consider which of the two, husband or wife, survived the other, or rather whether the husband was the survivor, so that the property had vested in him under the wife's appointment. Lord Wensleydale (3) deals with the possibility that they both died at the same moment and points out that the language of the will would not be satisfied in that event. The precise event there postulated was survivorship. The possibility of simultaneous death was a different uncertainty but one which would have been equally fatal to a claim based on showing the husband's survivorship. Similarly, Lord Chelmsford (4) refers to " a highly improbable state of facts . . . . either of their "

(1) 8 H. L. C. 183.
(2) Ibid. 197, 198.
(3) Ibid. 213.
(4) Ibid. 221.

(i.e., the husband and the wife) "both perishing together, or of "its being impossible to ascertain which was the survivor." I have referred to these passages because of the appellants' contention that the section must be construed as covering something other than an uncertainty as to the order of survivorship. I cannot find any justification for this departure from the plain words of the section. It specifies precisely what is the uncertainty contemplated; it is uncertainty "which of them "survived the other." If the true inference of fact is that neither survived the other, then the section, according to its language as I construe it, does not apply. The earlier cases and in particular *Wing's* case (1) had debated whether there was any presumption at all as to survivorship. This House held there was not; it was a question of fact. It had been held in the ecclesiastical courts that where husband and wife perish by the same accident and there is nothing to show that the husband survived the wife, they must be presumed to have died at the same time: as instance of cases in which this question was considered, I may refer to *Satterthwaite* v. *Powell* (2), in the Prerogative Court, where the doctrine of the ecclesiastical courts was applied, and *Wing's* case (1). *Wing's* case (1) showed there was no such presumption in English law. Section 184 thus introduced a new and very arbitrary presumption to operate in case of the specific uncertainty defined in the section. But as I agree with the Court of Appeal that there is here no uncertainty, the persons having all died at the same time, the section is irrelevant. *Wing's* case (1) was the case of a shipwreck: husband, wife and two young boys were swept away from the doomed vessel, apparently on her beam ends, by a wave and were never seen again. A third child, the daughter, was proved to have survived the others, because she had been tied to a spar and was seen alive after the others had disappeared in the sea. The Master of the Rolls (3) has here pointed out how different such a casualty is from the calamity here in question where a high explosive bomb has burst in the confined space in which all the five persons were. The same distinction is also apparent in the earlier cases, which were mainly cases of shipwreck. In all such cases the element of instantaneous catastrophic death is absent. This is well explained by the Master of the Rolls in his judgment under appeal.

I have not overlooked that Cohen J. found that the deaths were not proved in this case to have been simultaneous. It was said that the Court of Appeal were not justified in reversing his judgment of fact. It is indeed true that an appellate court will not generally reverse a decision of fact of the trial judge, where he has seen and heard the witnesses and come to his conclusion on the impression formed on him by them. But that is not the case here. This case falls within the class to which I referred in *Powell* v. *Streatham Manor Nursing Home* (1), where I said: " Many, perhaps most cases, turn on inferences from facts, " which are not in doubt, or on documents: in all such cases " the appellate court is in as good a position to decide as the " trial judge." Nor am I clear that the trial judge was not (perhaps unconsciously) influenced by the fact that in a similar but not identical case of a bomb explosion, in *In re Lindop. Lee-Barker* v. *Reynolds* (2), Bennett J. had held that the presumption under s. 184 applied. As I have explained, I do not think it applied in the present case, and that makes it easier to reconsider his finding of fact. But in any event a decision on a question of fact does not constitute a precedent in law for a decision on analogous facts. Each question of fact must be decided on the evidence in the particular case in accordance with the appropriate principles of law as was pointed out by the Court of Appeal in *Tidy* v. *Battman* (3). It may be that Cohen J. was to some extent influenced by a somewhat obscure dictum of Lord Cranworth L.C. in *Underwood* v. *Wing* (4): " It cannot be assumed to be proved, or probable, or possible, " that two human beings should cease to breathe at the same " moment of time." In *Wing's* case (5) this dictum was not repeated or referred to in any of the opinions in this House. As I have shown above, the House of Lords in *Wing's* case (5) treated the particular issue as one of fact in which there might be a preponderance of evidence one way or the other. I need not however examine this dictum further because it has been very properly admitted in this House that simultaneous death is possible in fact. No ground has been indicated to support the opposite view. It is certainly not a proposition of law, any more than the suggestion cautiously referred to by Lord Campbell L.C. in *Wing's* case (6): " time . . . . is said to be " infinitely divisible." If there be any truth in this suggestion,

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(1) 8 H. L. C. 183.

(2) (1838) 1 Curt. 705.

(3) [1944] Ch. 138, 145.

(1) [1935] A. C. 243, 267.
(2) [1942] Ch. 377.
(3) [1934] 1 K. B. 319, 322.
(4) 4 De G. M. & G. 633, 661.
(5) 8 H. L. C. 183.
(6) 8 H. L. C. 183, 199.

a judge of fact cannot get any help from it in a case like this. I would dismiss the appeal.

Lord Porter. My Lords, if in this case the question at issue had been mooted before the passing of s. 184 of the Law of Property Act, 1925, there is no doubt that the appellants must have failed. At that time anyone whose title depended on the survivorship of the person in respect of whom the claim was made could not have succeeded unless it were shown that that person in fact survived to inherit the property, the right to which was in dispute. The onus of establishing this fact was on the claimant and that onus was not discharged if it was doubtful whether the person concerned died before or simultaneously with some other person who might be entitled or through whom his own title attached. There was one uncertainty and one only, viz.: did the person through whom a right to property was said to be derived survive, or did he not survive, to inherit the property. For this proposition it is sufficient to quote *Wing* v. *Angrave* (1), but there are a large number of authorities to the like effect. If there were cross-claims, i.e., if A was entitled to B's property in case he survived B and on the other hand B was entitled to A's property in case he was the survivor, and it could not be established which survived the other, whether because it was uncertain or because both died simultaneously then the same result followed either in the ecclesiastical court or elsewhere. No finding was necessary save that neither had been shown to survive the other, and the direction given by the court was not that the two or more persons concerned died simultaneously, but that the estate must be distributed as if they had done so. The court was not concerned with any question other than the question whether it could or could not be shown that one survived the other. The law still remains in this form in Scotland and its results can be seen in *Drummond's Judicial Factor* v. *Lord Advocate* (2). In English law, in order to establish a claim, it had always been necessary to show as a matter of fact that the person whom the claimants represented had survived the other. In Roman law and in some foreign codes in cases of uncertainty presumptions of law were adopted by way of solving what would otherwise be insoluble. The Roman law is to be found in Justinian's Pandects (Pothier, vol. II.) Dig. Lib. xxxiv., Tit. V. Reg. IV.— a section of the work which is entitled " De Rebus Dubiis "

(1) 8 H. L. C. 183.

(2) 1944 S. C. 298.

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and contains as part of its heading the statement "Superest ea "tantum Dubii species quœ ex incerto ordine morientium aut "nascentium proficiscitur: de qua re paucas regulas pro- "ponemus." The fourth rule is headed "Quum nulla ratio "occurrit dignoscendi aut præsumendi utra ex duabus personis "præmortua sit; adversus eum cui una, ex illis personis "præmortua petitio competeret, pro possessore reponetur" and gives a number of examples—recognizing that it might be possible to prove that one died before the other, but in all cases putting as the alternative that they died at the same time, e.g., Ex. 1. "quod si simul"; 2. "quod de pariter mortuis "tractamus"; 3. "simul cum marito perierit"; 4. "Si "maritus et uxor simul perierint"; 5. "si dominus cum servis "simul vita functus sit." Read in conjunction with the heading these provisions of the Roman law would seem to deal with things which are doubtful and that, in the passages quoted, the words simul, pariter, etc., mean not that there was exact simultaneity of death, but that the deaths occurred in some common calamity and their sequence was doubtful. Similarly the Code Napoléon in Art. 720 says "Si plusieurs personnes "respectivement appellées à la succession l'une de l'autre, "périssent dans un même évênement, sans qu'on puisse recon- "naître laquelle est decédée la première, la présomption de "survie est determinée par les circonstances du fait, et, à leur "défaut, par la force de l'âge ou du sexe," and in the following arts. 721 and 722 it speaks in terms similar to those used in the Roman law, e.g., "Si ceux qui ont péri ensemble." Here "ensemble" appears to mean "in the same disaster" and not at the exact same moment of time. In each case the presumptions were adopted not to deal with the case where it could be shown that there was simultaneous death but to resolve those cases where it had to be determined which of two persons survived the other and the answer was uncertain.

In English law uncertainty meant failure of the claim and equally the claim would fail if the persons whose deaths were involved had died at the same moment of time. It was therefore unnecessary to consider which of those two theoretical contingencies had in fact occurred or indeed whether the second was practically possible or, at least, whether it could ever be proved. As to its possibility different judges seem by the expressions they used to have shown some difference of outlook. As long ago as 1784 Lord Thurlow L.C. in *Bradshaw*

v. *Toulmin* (1) said: "If two persons, being joint tenants, "perish by one blow, the estate will remain in joint tenancy "in their respective heirs," and in *Taylor* v. *Diplock* (2), Sir John Nicholl, in a case where husband and wife perished in the same shipwreck, said: "I am not satisfied that proof is "adduced that the wife survived: taking it to be that both died "together, the administration is due to the representatives of "the husband: I assume that they both perished at the same "moment." Again Grant M.R. in *Mason* v. *Mason* (3), said: "There were three contingencies; either the daughter sur-"vived the father, or the father the daughter, or both perished "at the same instant." In none of these cases however was the mind of the judicial authority directed towards the question now in issue: all that was being considered was whether it could be determined that one survived the other and, if so, which? Indeed it is common ground that there is no case in the books in which the present point came in issue. How little any distinction was drawn between simultaneity of death and inability to prove the sequence is to be seen in *In the Goods of Beynon* (4), where the headnote of the case says that Gorell-Barnes J. "gave leave to vary the usual form of oath to lead "the grants" (of administration) "by allowing the adminis-"trator and administratrix to swear that the husband and "wife perished at the same time (named), and that, after due "enquiries, there was no reason to believe that either survived "the other," whereas in fact the learned judge said nothing about their perishing at the same time. The whole question of survivorship was discussed with reference to the law as it then stood in *Underwood* v. *Wing* (5) and in *Wing* v. *Angrave* (6). The former was an appeal from a judgment of Romilly M.R., in which Lord Cranworth L.C. took the advice of Wightman J. and Martin B. According to their opinion (7): "The question "of survivorship is the subject of evidence to be produced "before the tribunal which is to decide upon it, and which is to "determine it as any other fact. If there be satisfactory "evidence to show that the one survived the other, the tribunal "ought so to decide, independent of age or sex; and if there "be no evidence, the case is the same as a great variety of "other cases, more frequent formerly than at present, where

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(1) 2 Dick. 633.
(2) 2 Phillim. 261, 280.
(3) 1 Mer. 308, 313.
(4) [1901] P. 141.
(5) 4 De G. M. & G. 633.
(6) 8 H. L. C. 183.
(7) 4 De G. M. & G. 633, 657.

"no evidence exists, and of consequence no judgment can be "formed. Upon this point we concur with the Master of the "Rolls; we think there is no evidence to show whether the "husband or wife was the survivor. . . . . The Master of the "Rolls is represented in the report of his judgment to have said, "'There is therefore no evidence to show who was the survivor, "'and the conclusion of law is, that both died at the same "'moment.' According to our view this is not correct; "we think there is no conclusion of law upon the subject; "in point of fact we think it unlikely that both actually did die "at the same moment of time, but there is no evidence to show "which of them was the survivor." Following this advice the Lord Chancellor said (1): "In the report of the case before "the Master of the Rolls, His Honour is represented in one "passage to have said that he must assume that Mr. and "Mrs. Underwood both died together. From personal com-"munication with His Honour, I know that he is not aware "that he ever used such an expression, and all he ever meant to "say was that the property must be distributed just as it would "have been if they had both died at the same moment. "It cannot be assumed to be proved, or probable, or possible, "that two human beings should cease to breathe at the same "moment of time, for that is hardly within the range of "imagination, and to adjudicate on such a principle would, "I think, be proceeding on false data, but the real ground to "proceed on is that it cannot be proved which died first. "They both probably died within a few seconds of each other, "but which died first it is impossible to say." The claim in *Wing* v. *Angrave* (2) arose out of the same facts and by the time it was heard Lord Campbell had taken the place of Lord Cranworth as Lord Chancellor. Lord Campbell after stating (3) that it was a pure question of fact and that he did not think the House could obtain any assistance from the numerous cases where judges had held evidence sufficient or insufficient to satisfy them that one of two individuals who perished from the same calamity was the survivor, later continued (4): "I need "hardly say, that I think there is no foundation for the "doctrine, erroneously imputed to the Master of the Rolls. . . . "where it is left doubtful which of two individuals died first, "there is a presumption of law (juris et de jure) that they died "at the same point of time. I will not say that this is

(1) 4 De G. M. & G. 660.
(2) 8 H. L. C. 183.
(3) Ibid. 198.
(4) Ibid. 199.

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"impossible, although *time*, like *matter*, is said to be infinitely "divisible, but such a presumption is not warranted by "decision, by dictum, or by analogy." Lord Cranworth said (1): "The rule of construction relied on by the appellant might have "been contended to be applicable if the fact had been, and had "been ascertained to be, that Mr. and Mrs. Underwood both "died at the same instant of time, if that could be possible." "The evidence," said Lord Wensleydale (2), "leaves it in "total uncertainty whether the husband died before or after "the wife, or whether they both died at the same instant. "Whoever has to maintain any one of these propositions, must "certainly fail." And finally, Lord Chelmsford said (3): "Had it occurred to her mind that a highly improbable state of "facts might arise, either of their both perishing together, or of "its being impossible to ascertain which was the survivor, no "doubt she would have used apt words to embrace such an "extraordinary contingency."

My Lords, I have examined the phraseology used in these two cases somewhat at length because they exhibit, as I think, very forcibly, the attitude of mind adopted by judicial authorities prior to the passing of the Act of 1925. They show in some cases an acceptance, at least in theory, of the possibility of simultaneous death, but only in cases where the same result would follow whether the two or more deaths occurred at the same time or whether it could not be shown which preceded which, coupled with a recognition of at least the extreme improbability of two deaths being exactly contemporaneous and indeed with some hint of its impossibility. The uncertainty to which the tribunal's mind was directed was between an inability to ascertain who survived the other as opposed to a proved survivorship in the case of one. A problematical and somewhat fanciful case of simultaneous death is mentioned, but its incidence if it were possible could make no difference. In these circumstances s. 184 of the Law of Property Act was passed. Your Lordships must forgive me if I repeat its terms. They are: "In all "cases where, after the commencement of this Act, if two or "more persons have died in circumstances rendering it "uncertain which of them survived the other or others, such "deaths shall (subject to any order of the court), for all "purposes affecting the title to property, be presumed to have "occurred in order of seniority, and accordingly the younger "shall be deemed to have survived the elder."

(1) 8 H. L. C. 209.
(2) Ibid. 213.
(3) Ibid. 221.

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Two arguments were presented to the courts below which were not maintained before your Lordships. It was not contended in your Lordships' House that the matter in issue did not affect the title to property nor was it submitted that the words "subject to any order of the court" gave the judge hearing the case an unfettered discretion as to the order he should make. I therefore leave both expressions for future discussion, should such discussion become necessary. The vital words for your Lordships' consideration I take to be "In all cases where . . . . two or more persons have died in "circumstances rendering it uncertain which of them survived "the other or others. . . . ." For the appellants it was contended firstly that though simultaneity of death was theoretically possible, and perhaps even possible in fact, yet its existence could never be proved and therefore in all cases where it could not be shown that one survived the other there was always such uncertainty as the section requires. Secondly, that in the present case it was in fact uncertain which of the four persons concerned survived. There were, it was said, only two alternatives: either it could be shown who was the survivor or it could not, and if it could not, the sequence of death was uncertain. On the part of the respondents it was maintained that the facts established instantaneous and contemporaneous death in the case of each of the four persons, and therefore there was no uncertainty: they all died together. Speaking for myself, I should be inclined to read the section, even without the previous history, as presenting only two alternatives, viz.:—(1.) an ability to show the order of death or (2.) uncertainty. Like Lord Cranworth, I am not sure that the occurrence of two deaths at exactly the same point of time is possible, and still less am I inclined to accept the allegation that it can ever be proved. But quite apart from theoretical questions of this kind, I think the section itself is so framed as to exclude the possibility of simultaneous death from ever being recognized as a certainty and to include it amongst the uncertainties. It does not speak of uncertainty as to whether the persons concerned died at the same time, but seeks to determine which survived the other. It seems to be concerned with survivorship or no survivorship, and not to be concerned with some tertium quid which is neither the one nor the other. When the previous history is taken into consideration I am confirmed in this opinion. There were previously two possibilities; not three: one uncertainty; not two. The section was presumably passed to get rid of practical difficulties which had occurred in the administration of estates. Those difficulties, so far from being resolved, seem to me to be increased if the construction urged by the respondents is adopted. To prove or to fail to prove that one person survived another is a simple issue of fact. To bring into question whether it is not shown that there was simultaneity of death presents, in my view, difficulties of the gravest kind. A question of fact is primarily a question for a jury. If the case were being so tried, what direction should be given them to enable them to determine whether two deaths occurred at the same moment of time? "Substantially "the same time!" "What a reasonable man would call the "same time!" "What in the ordinary parlance of mankind "is considered the same time!" All seem to me hopelessly vague. The difficulty is to direct a jury what division of time is sufficient to constitute survivorship and what insufficient, or indeed for a judge alone to make such a decision. Sir Walter Monckton came, I think, nearest to it when he said there would be simultaneity of death in a case where there was a common calamity causing instantaneous death in which it could not be shown that any lapse of time had occurred between one death and another; but this seems to me to establish an inability to show that the deaths did not occur at the same time rather than an ability to show that they did. The construction of the section, then, in my opinion, supports the appellant's contention, but in any case it is at least doubtful, and its wording, combined with a recognition of the mischief to be cured and the history of the difficulties previously met with, points, as I think, to uncertainty as being recognized to exist unless positive proof of survivorship can be given. If, however, the possibility of proving simultaneous death was contemplated by the section or was practicable, I should be inclined to say that the facts in the present case go as far, or nearly as far, as they could to show simultaneous death. It is true that there is no positive proof that all four were in the shelter at the time when the bomb fell, and that the bodies were brought up at two separate times, but they were all mutilated to a more or less degree, all unrecognizable, and all buried in the ruins of the one house. Their separate exhumation is easily explainable as the result of some portion of the shelter being dealt with before the rest, and the balance of probability is that they all died at approximately the same time from the blast of one bomb whilst taking refuge in the shelter. This inference, however, as I have suggested to your Lordships, is not enough.

Before leaving the case I should desire to say something as to the amount of uncertainty required in order to establish that, in a case such as this, s. 184 applies. It is undoubted law that in civil cases absolute proof of the fact to be determined is not required: it is enough if from facts admitted or proved a reasonable inference can be drawn. *Lancaster* v. *Blackwell Colliery Co., Ld.* (1), was quoted as establishing this principle, and in the case of a matter so well recognized it is, perhaps, authority enough. Moreover, in a case where no oral evidence was given, but an inference has to be drawn from what appears in affidavits, an appellate court is in just as good a position to draw a correct inference as is a court of first instance, and one appellate court in just as good a position as another. If authority is needed, the latest case quoted to your Lordships, viz., *Powell* v. *Streatham Manor Nursing Home* (2), may be cited. If, then, the fact which had to be proved was the sequence, if any, in which the persons interested died or that all died at the same instant, it would be enough that the balance of probability pointed one way; it would not be necessary to show absolute certainty. But in the present case, under the section, what has to be proved is not whether there was simultaneous death, or not, but the certainty of simultaneous death, or rather uncertainty as to who survived whom. I can imagine a court whether judge or jury, being asked on a balance of probabilities: Do you draw the inference that A and B died at the same moment of time? and replying, Yes!: but on the inquirer putting the further question, But are you certain? I can imagine the answer being No! That a court may have to come to a decision one way or other upon inconclusive evidence is illustrated by an excerpt from Best on Evidence (2nd ed.), at p. 114, where he quotes the words of Dyer C.J. in *Newis* v. *Lark* (3): " *If the matter is doubtful,* they " (the jury) " may " found their verdict upon that which appears the most " probable, and by the same reason that which is most probable " shall be good evidence." The italics are mine, and the wording seems to suggest that, though in law there may be sufficient proof of the fact, yet there is still some uncertainty. My Lords, on my view of the case it is unnecessary to determine which of these two replies would determine the case, and I prefer to express no opinion until it is imperative to give one. I merely deal with the point because I understand some of your Lordships take the view that an inference reasonably drawn on a balance of probabilities is sufficient. I am not sure whether it is or not, and would leave the point open. For the reasons I have given, however, I would allow the appeal and say that it was uncertain which of the four persons survived the others.

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(1) 89 L. J. (K. B.) 609.

(2) [1935] A. C. 243.

(3) (1571) Plowd. 403, 412.

My Lords, I would add that I am conscious that the matter at issue is one likely to give rise to a considerable divergence of view. Opinion below is equally divided, and I am aware that there is likewise a difference amongst your Lordships. It is said, and I think said truly, that where possible the law should avoid too great subtlety in interpretation and should follow the common sense view, and it is added that in the present case, in the judgment of mankind, the deaths were simultaneous, whatever infinitesimal difference in time could be imagined between them. As I have said, the difficulty I find in accepting this view is that it leaves too great a latitude to those who have to decide the question. If courts in the past had shown any sign of following the adage " de minimis non curat lex " in matters of survivorship I should have felt less difficulty, but where seconds are, or indeed any measurable interval is, recognized as constituting a sufficient difference of time, I cannot think that fractions of a second should be neglected. Moreover, the construction, which I suggest to be correct, at least gives a clear principle on which the courts can act and does away with nice questions of the little more or the little less, and is in accordance, I think, with scientific principles. If at some future date the scientist devises an instrument which can ascertain exactly when death takes place, and so accurate as to indicate that the deaths of two persons were coincident, it may be necessary to give effect to their discovery. For the moment they have not done so. High explosives have no doubt made a lasting difference in the probable length of the interval of time between one death and another, but they have not abolished it. At any rate, I do not think s. 184 recognizes that they have. I would allow the appeal.

LORD SIMONDS. My Lords, on January 1, 1926, there came into force s. 184 of the Law of Property Act, 1925. That section is as follows : " In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court) for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and "accordingly the younger shall be deemed to have survived the "elder." This enactment remedied a defect in English law. Previously, if A and B died in a common calamity, it was necessary for the representatives of that one of them who claimed to be interested in the estate of the other under his will or as upon his intestacy, to prove that he was the survivor. If they did not prove it the claim failed. In the not uncommon case when each of them was interested under the will or as upon the intestacy of the other, neither of them could take any interest unless his survivorship was proved. It followed that in such a case the estate of A had to be administered upon the footing that B did not survive him and the estate of B upon the footing that A did not survive him, a result which could be stated in a compendious form by saying that the estates of A and B were to be administered as if they had died at the same time. Survivorship was a fact to be proved like any other fact. There was no presumption of it founded on age or sex or any other factor. So also there was no presumption of death at the same time. This was the sum of the law on this question and, though in the comparatively few cases in the books, in which the subject has been discussed, there will be found on the one hand observations by judges which appear to contemplate the possibility of two persons dying at the same time, and on the other hand observations by other judges, which suggest that such an event is beyond the reach of imagination, it is clear that, before this case or its predecessor, *In re Lindop, Lee-Barker* v. *Reynolds* (1) (which was heard by the late Bennett J.), no court in this country had been called on to determine whether two persons can die at the same time or how such a fact can be proved or what in such a context is the meaning of the words "at the same time." These questions were all irrelevant when the only issue was whether A survived B; if that fact was not proved, it mattered not whether B survived A or whether they died "at the same time." I hope that I am not wanting in respect to the very eminent judges to whose observations I have referred if I say that I get little help from them in the construction of the section which now has to be considered.

At this stage of my opinion only a bare outline of the facts is necessary. On September 14, 1940, a high explosive bomb fell on No. 5, Upper Cheyne Row, Chelsea, where there were taking shelter five persons, of whom four were Randolph Lea

(1) [1942] Ch. 377.

Grosvenor, aged seventy-three, his brother Edward Moberley Grosvenor, aged sixty-six, their housekeeper, Elizabeth Sarah Parke, aged seventy, and the occupier of the house, Mabel Edith Price-Jones, aged fifty-two. All these persons were killed, and I do not prejudge any issue when I add that they might well be popularly said to have been killed at the same time. Under the will of the elder brother Randolph, the younger brother Edward and the housekeeper were beneficiaries: under the will of Edward his brother Randolph, the housekeeper and Mrs. Price-Jones were all beneficiaries. The circumstances were such that it was clearly impossible for the representatives of any of them to prove that he or she survived the others. The question therefore arose whether this was a case to which s. 184 of the Law of Property Act applied, i.e., had these four persons died in circumstances rendering it uncertain which of them survived the other or others? This question has been answered in the affirmative by Cohen J., but in the negative by the Court of Appeal, the late Luxmoore L.J. dissenting. My Lords, the grounds of the decision of the Court of Appeal may, I think, be fairly stated in a very few words. They are that the proper inference from the facts of this case is that the deaths in question were simultaneous—a variant expression of " took place at the " same time "—and that where this is the proper inference the operation of the section is excluded. Put in a slightly different way, the argument is that the section only operates where the proper inference from the facts is that the persons in question died not simultaneously but consecutively. In this House the argument was somewhat expanded by saying that it is the proper inference that deaths are simultaneous or consecutive, as the case may be, when the balance or preponderance of probability favours that inference. To me, my Lords, this argument appears to ignore realities. It cannot, I suppose, be questioned that the section was designed to meet the case of common calamity for which some other systems of law, notably the Roman law and the Code Napoléon, make provision. It is significant that in these systems it is implicit that it is either proved which of two persons dies first or the order of death remains uncertain and, where it is uncertain, presumption is given the place of proof. No provision is made for simultaneous deaths as distinguished from deaths in uncertain order, but deaths, where the order is uncertain, are described in terms of simultaneity. For example, the Roman law (see Dig. Lib. XXXIV. Tit. V. De rebus dubiis), dealing with that " dubii "species quæ ex incerto ordine morientium proficiscitur," gives examples in which such phrases as these occur: "cum "pubere filio mater naufragio periit," "cum bello pater cum "filio periisset" "uxor simul cum marito decesserit," "si "maritus et uxor simul perierint." So, too, in the Code Napoléon the repeated phrase is "ceux qui ont péri ensemble." Yet, if the decision under appeal is correct, the section, designed to fill a gap and remedy a mischief, fails in part at least to do so and introduces a conception which, if hinted at in the observations to which I have referred, has had no place in the English or, so far as I am aware, any other system of law, and which, as I shall endeavour to show to your Lordships, is incapable of legal definition.

It is said that the section has no operation where the proper inference of fact is that the deaths in question are simultaneous. I do not understand it to be contended that there must first be an inquiry whether two or more deaths are simultaneous, and then, and only if that inquiry is answered in the negative, a further inquiry whether the circumstances render the order of death uncertain. Indeed, I understood it to be conceded by learned counsel for the respondents that there could be but one inquiry, but that it would allow an answer either (1.) that A survived B or vice versa, or (2.) that it was uncertain which of them survived the other, or (3.) that neither survived the other because they died at the same time. If the first answer was given, there would be proof of survivorship; if the second, presumption of it; if the third, there would be neither proof nor presumption, but the law would stand as it stood before the Law of Property Act, 1925, came into operation. If, therefore, the case was one in which both A and B were interested to prove survivorship and the third answer was given, their estates would have to be administered upon the footing that they died at the same time, neither taking any interest in the estate of the other, so that just that unsatisfactory result would be reached which in the case of uncertainty it was the purpose of the section to avoid. That it was the intention of the legislature to achieve this result no one can suppose. It cannot have been deliberately intended to supply a remedy by way of presumption where the estates of A and B had to be administered as if they had died at the same time because the order of their deaths was uncertain, but to supply no remedy where the same estates had to be administered upon that footing because they, in fact, died at the same time. It may, nevertheless, be that the case is a casus omissus, and that the language of the section is so plain that no other conclusion can fairly be reached. I turn again to the section, and assuming, as the respondents contended, that its operation is precluded if there is simultaneity of death, ask two questions which are complementary to each other: (1.) in measurement of time, what is meant by survivorship? (2.) what is meant by such expressions as " simultaneity " of death or " dying at the same time? " I say that the two questions are complementary, because it is clear that the same standard of measurement must be applied. It cannot be said that two persons dying, the one a second after the other, die at the same time, unless it can also be said that one person surviving the other by a second does not survive him. Conversely, it cannot be said that A, surviving B by a second, does not survive him, if in such circumstances A and B are not said to die at the same time.

I examine the second question first. I do not know the answer to it. In vain I tried to elicit from learned counsel what the answer to it was. It helps me not at all to hear that the expression " at the same time " must be understood according to the common understanding of mankind. It is at least an expression of which the meaning must vary according to the context and subject-matter. In one context seconds, even minutes, even parts of a day may be disregarded; in another the difference of a small fraction of a second may be all-important. The standard must be set before the maxim can be applied " de apparentibus et existentibus eadem est ratio." What is the standard in this context? A judge, with the limited power of discernment that nature has bestowed on him, may decide that two horses have passed the post at the same time. A high-speed camera will show that he was wrong and that one horse passed it in front of the other. And if that camera appeared to show that they passed at the same time, yet a finer instrument would show that that too was wrong. It is the same with spatial and with temporal measurement: the example that I have given might be used to illustrate either of them. Suppose the question to be whether two bars of metal are the same length; the answer may be correctly given Yes, though there is a difference between them of one eighth of an inch, if that difference is in the context immaterial: but where an instrument of the greatest precision is required it might be false to say that they were of the same length, though the difference between them was only one thousandth part of an inch. But what if the context is such that an answer must be given to the question, which of the two bars is longer? Then it is as false to say they are of equal length if the difference is an eighth as if it is a thousandth or a ten thousandth part of an inch. And if the finest instrument can detect no difference, the answer is not that they are the same length, but that until a finer instrument has been made it remains uncertain which is the longer. So here the context of the question whether A and B died at the same time (if indeed it is necessary to ask it) is the complementary question, which of them survived the other? And so here, as the circumstances make it more and more difficult to determine which of them died first, the uncertainty increases. Human perception, aided by human understanding, fails to discern which of two persons dies first. For my part, therefore, I would in such a case say in all humility that it is uncertain which of them survived the other and shrink from the assertion that they died at the same time, a thing that I do not know and cannot prove. I decline to find simultaneity of death upon a balance or preponderance of probability unless that expression is first defined. The attempt at definition leads irresistibly to the conclusion that, where there is no proof of survivorship, the answer is not simultaneity but uncertainty. To this conclusion, too, the nature of the subject-matter points. It is possible, I suppose, to measure the happening of some events to a very small fraction, the thousandth part or less, of a second: but even in the quietude of a bedroom, with all the aid that science could give, it would be difficult to ascribe to any minute fraction of time an event so mysterious, so impalpable, so difficult to define as that, before the happening of which a man is said to be alive and after it to be dead. I conclude, then, that the true construction of s. 184 is that it proceeds upon the footing that the proof of simultaneous death is impossible, or in other words upon the footing that, if survivorship is not proved, the only alternative is uncertainty. If it is thus read, there is no casus omissus and the section can be so construed as to cover every case in which it cannot be proved that one of two persons dying together survived the other. In coming to such a conclusion I would reject the suggestion that it is that of a metaphysician rather than of a lawyer, unless indeed metaphysic here includes logic. It is a conclusion which has regard to our pre-existing law, to the way in which other systems of law have dealt with the same problem, and to the physical realities of the situation, and without putting any strain upon its language gives to the section a consistent and sensible meaning.

If the construction that I would put upon the section is accepted, that is an end of the matter. But if the alternative view prevails and the operation of the section is excluded where upon a preponderance of probability the proper inference is that the deaths in question are simultaneous, it becomes necessary to look more closely into the facts of the present case. I find myself hampered in my researches by not seeing the goal clearly, for I do not yet understand what is the meaning of that which is to be inferred. It appears, however, that the inference is based, first, upon the effect of a high explosive bomb exploding, as I will assume, in the basement of the house, secondly, upon the condition of the bodies, all of which were recovered from the ruins of the house, and, thirdly, upon the probability that, since all the persons concerned used the basement shelter for safety, they were all together in that shelter at the time of the explosion of the bomb. It would, I think, have been contended by counsel for the respondents that the same inference of simultaneous death should be drawn, even if it could not properly be inferred that all the victims were in the same basement shelter : it would have been enough if they were in any part of the basement, or indeed in any part of the house. I dissent from every one of these propositions. If the inference of simultaneous deaths rests on proving, according to the ordinary standards of proof, that all the victims were in the shelter when the bomb fell, I hold that that fact is not proved. There is no evidence that any one of them reached the shelter before the bomb fell or that he or she remained throughout the period of alarm within the sheltered part of the basement. There is no evidence that the bombing had been severe or that more than one bomb fell in the neighbourhood on that occasion. It appears to me to run counter to all experience to say that in such circumstances the proper inference is that all the victims remained all the time in the shelter, not even straying into the other part of the basement. If it is not established that the victims were all in the shelter together at the time of explosion, I see no ground for inferring, upon any standard of measurement of time that may reasonably be adopted, that all died at the same time. I conclude therefore by saying that if, contrary to my view, simultaneity of death can in any case be inferred, this is not such a case. I would only add that I have tried in vain to give any reasonable meaning and effect to the

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parenthetical words "subject to any order of the court." I would allow this appeal and restore the order of Cohen J.

Appeal allowed.

Solicitors for appellants: *Parker, Garrett & Co.*
Solicitors for respondents: *W. R. J. Hickman & Randall.*

Applied. DEAN v. BRUCE
[1952] 1 K.B. 11

REGIONAL PROPERTIES, LIMITED . APPELLANTS;

AND

OXLEY . . . . RESPONDENT.

H. L. (E.)*

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July 5, 30.

Landlord and tenant—Rent restriction—Conditions of statutory tenancy—Terms of original tenancy—Proviso for reduction of rent on punctual payment—Increase of Rent and Mortgage Interest (*Restrictions*) *Act*, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 1.

The tenancy agreement for a monthly tenancy of a London flat at a yearly rent of 90*l.*, the standard rent under the Rent Restrictions Acts, payable by equal monthly payments, provided for a specified reduction of rent on punctual payment. The landlords having given notice of a statutory increase of rent to 92*l.* 1*s.* 6*d.*, the addition being in respect of rates payable by them, this operated as a notice to quit on the expiry of which a statutory tenancy came into existence:—

Held, that the proviso for reduction of the rent on punctual payment was not "consistent with the provisions of" the Rent and Mortgage Interest (Restrictions) Act, 1920, within the meaning of s. 15, sub-s. 1, and accordingly that the tenant was no longer entitled to the benefit of it.

Bryanston Property Co., Ld. v. *Edwards* [1944] K. B. 32, overruled.

Decision of the Court of Appeal (sub nom. *Oxley* v. *Regional Properties, Ld.*) [1944] W. N. 190; 60 T. L. R. 519, reversed.

APPEAL from the Court of Appeal.

The facts were as follows: By an agreement dated January 30, 1941, the appellant company, Regional Properties, Ld. let to the respondent, Ernest Oxley, a flat, No. 49 Pullman Court, Streatham Hill, London. Clause 1 of the agreement provided that the tenancy was to be "for the term of three months from "October 28, 1940, at the clear yearly rent of 90*l.* payable by "equal monthly payments of 7*l.* 10*s.* 0*d.* in advance the first "payment to be made on the signing hereof Provided always "that if the premises shall be held thereafter the tenancy shall "be continued as a tenancy from month to month determinable "by one month's previous notice in writing given by either "party to the other on the twenty-eighth day of any month to "expire on the twenty-seventh day of the month next following "And Provided further that the landlord shall credit the "tenant's account with an additional sum of 16*s.* 8*d.* upon "the tenant paying to the landlord the sum of 6*l.* 13*s.* 4*d.* "within fourteen days of the day on which any monthly "payment of rent ought to be made to the landlord in "accordance with the provisions hereinbefore contained." The respondent continued in possession after the expiry of the three months and was still in possession at the time of these proceedings. On February 27, 1943, the appellant company gave written notice to the respondent that the rent of the premises as from March 29, 1943, would be 92*l.* 1*s.* 6*d.* per annum, composed of the standard rent of 90*l.* and a statutory increase of 2*l.* 1*s.* 6*d.* in respect of rates payable by the appellants. It was not in dispute that the standard rent, as fixed by reference to the rent payable, by a former tenant, one Pickles, under a previous tenancy agreement of August 9, 1938, was 90*l.*, or that the increase in respect of rates was permitted by statute. The notice thus served on the respondent operated as a notice to quit, and on its expiry a statutory tenancy came into existence. The respondent instituted proceedings in the Willesden County Court claiming the continued benefit of the proviso for the reduction of rent on punctual payment. The county court judge, holding himself bound by *Bryanston Property Co., Ld.* v. *Edwards* (1) decided in favour of the respondent. The Court of Appeal (Lord Greene M.R., MacKinnon and Luxmoore L.JJ.) dismissed the appeal of the appellants, who appealed to the House of Lords.

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* *Present:* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD PORTER and LORD SIMONDS.

Morris K.C. and *Seuffert* for the appellants. The proviso to cl. 1 of the agreement is not consistent with the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, within the meaning of s. 15, sub-s. 1. Nothing in the Act prohibits the appellants from increasing the rent up to

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the amount of the standard rent and permitted increases: *Phillips* v. *Copping* (1). If the respondent seeks to avail himself of the protection of the Acts, he must pay what is demanded by the appellants, provided it is within the ceiling of the Acts. Among "the terms and conditions of the original "contract of tenancy," of which a tenant is to be entitled to the benefit under the statutory tenancy by virtue of s. 15, sub-s. 1, rent is not included. The language of the proviso to cl. 1 had reference to the rent reserved by the contract of tenancy and was part of the reddendum. It therefore became inapplicable when the rent ceased to be the contractual rent and became the standard rent together with any permitted increase, since s. 15, sub-s. 1, does not refer to those terms of a contractual tenancy which fix the amount to be paid as rent. *Bryanston Property Co., Ld.* v. *Edwards* (2) was wrongly decided. *Capital and Counties Properties, Ld.* v. *Butler* (3) is indistinguishable. [They referred to the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, ss. 1 and 15, sub-ss. 1 and 2; the Rent Restrictions (Notices of Increase) Act, 1923, s. 1; the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, ss. 3 and 4, sub-s. 1, and sch. I.; the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 7, sub-s. 3, sch. II.]

G. Brooks and *Hallis* for the respondent. The proviso in the tenancy agreement for giving the respondent credit on punctual payment was one of the "terms and conditions of the original "contract of tenancy," to the benefit of which he is entitled by virtue of s. 15, sub-s. 1, of the Act of 1920. That proviso is not placed in the reddendum and cannot be treated as part of the provision for payment of rent. Its effect is not to alter the rent. It provides a bonus on punctual payment and as an encouragement to promptness it is as much for the benefit of the landlord as for the tenant. Only the actual covenant to pay rent is not preserved by virtue of s. 15, sub-s. 1. This is a stronger case than *Bryanston Property Co., Ld.* v. *Edwards* (2), which should be upheld. *Capital and Counties Properties, Ld.* v. *Butler* (3) is also correct and is distinguishable from that case.

Hallis following. There is no disagreement between the parties as to the actual meaning of s. 15, sub-s. 1, and it is not disputed that the appellants were entitled to raise the rent to the standard rent plus the statutory increase. The purpose of the sub-section was to preserve the terms of the original contract although the liability for rent was now statutory. "Proviso" is a term which may have different meanings. Sometimes it implies a qualification, sometimes a covenant. This proviso in the tenancy agreement is analogous to a covenant, under which a landlord might undertake to credit a tenant with a specific sum for repairs, it does not immediately follow the provision for payment of rent.

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(1) [1935] 1 K. B. 15.
(2) [1944] K. B. 32.
(3) [1944] K. B. 730.

THE HOUSE took time for consideration.

July 30. LORD THANKERTON. My Lords, the notice served on the respondent operated as a notice to quit, and on its expiry a statutory tenancy came into existence, which is more particularly regulated by sub-s. 1 of s. 15, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the material portion of which provides: "A tenant who by virtue "of the provisions of this Act retains possession of any dwelling-"house to which this Act applies shall, so long as he retains "possession, observe and be entitled to the benefit of all the "terms and conditions of the original contract of tenancy, so "far as the same are consistent with the provisions of this "Act. . . . ." The short question between the parties is whether the second proviso in cl. 1 of the original contract of tenancy as to the landlord crediting the tenant with 16*s*. 8*d*. on payment of his monthly rent within fourteen days is consistent with the statutory provisions. The respondent raised the matter by proceedings in the Willesden County Court, and the county court judge rightly held himself bound by the decision of the Court of Appeal in *Bryanston Property Co., Ld.* v. *Edwards* (1), and decided in favour of the respondent, and his decision was unanimously affirmed by the Court of Appeal, who also held that the case was ruled by the decision in that case. In this appeal the appellant company challenges the correctness of the decision in the *Bryanston Property Co.'s* case (1), and it will be necessary to examine it critically. In the *Bryanston Property Co.'s* case (1) a flat was let from February 8 to March 25, 1941, and thereafter from quarter to quarter, until determined by a quarter's notice in writing at a yearly rent of 275*l*. payable quarterly in advance; cl. 4 (1.) of the tenancy agreement provided: "So long as the present state

(1) [1944] K. B. 32.

"of war shall exist between Great Britain and Germany, and "for three months after the quarter day next following an "armistice the landlord will allow the tenant to deduct from "the rent hereby made payable the sum of 85*l.* per annum by "equal quarterly payments." The landlord duly terminated the contractual tenancy on September 29, 1942, and the tenant continued in possession as a statutory tenant. It was held that the standard rent was 275*l.*, but that the tenant was entitled, under s. 15, sub-s. 1, of the Act of 1920, to the benefit of cl. 4 (1.) of the original agreement. Lord Greene M.R. said (1): "Apart from authority, it seems to me to be reasonably "clear that the provision with regard to deduction from rent "during the war is a term or condition of the original contract. "The phrase 'terms and conditions' is, again, not very "technical. The sub-section does not use the word 'covenant' "but, subject to what I have to say about the authorities, the "word 'terms' must, I think, include covenant. For instance, "if the original contract of tenancy contained repairing "covenants by the tenant, those covenants would, I think, "be imported into the statutory tenancy when the contractual "tenancy came to an end. In the present case, what we have "is not a covenant, but what is quite aptly described as a term "of the agreement, namely, a provision inserted in favour of the "tenant enabling him in certain circumstances to satisfy the "obligation to pay the rent of 275*l.* by the payment of a lower "sum. That, I should have thought, was beyond question a "term of the tenancy agreement." After a reference to the case of *Phillips* v. *Copping* (2), in which it was held that, when under the contractual tenancy the rent was lower than the standard rent, the landlord was entitled, when the tenant held over as a statutory tenant, to increase the rent up to the standard rate, the learned Master of the Rolls said (3): "The "present case is very different from that. This is not a case "of carrying the covenant to pay rent into the statutory "tenancy. The landlord increases the rent to 275*l.* That rent, "as I have said, is the standard rent. The question then arises "whether the right which the tenant had possessed with regard "to precisely the same rent under the tenancy agreement is "imported into the statutory tenancy by virtue of the section, "It seems to me that a provision whereby the defendant can "satisfy his obligation to pay the higher rent by paying a lower "rent, is truly a term of his tenancy, and, accordingly, that

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(1) [1944] K. B. 38.
(2) [1935] 1 K. B. 15.
(3) [1944] K. B. 32, 40.

"his right to make that deduction as against what has now "become the standard rent under the statutory tenancy is "maintained and preserved. That conclusion is not merely in "accordance with the language of the section, but is also an "eminently just result." MacKinnon and du Parcq L.JJ. concurred.

My Lords, I respectfully venture to doubt the correctness of the learned judge's remark that his conclusion was an eminently just result. The tenant gets statutory fixity of tenure on payment of a statutory rent, and I should have thought it would be at least as just that he should not be entitled to pay a lower rent, merely because of a term or condition of the original tenancy. But our duty is to construe the words of the statute. The learned Master of the Rolls accepts that the expression "terms and conditions" in s. 15 must include covenants, of which the covenant to pay rent will be one, but it will be excluded because of its inconsistency with the provisions of the Act; he further accepts that the provision there in question enabled the tenant to satisfy his obligation to pay the higher rent by paying a lower rent, although he describes the rent payable under the statutory tenancy as precisely the same as the rent under the original agreement. Although the same in amount, as it happened in that case, the statutory rent appears to me to be different in quality, particularly in respect of the statutory limitations, which, in my opinion, operate in two directions, viz., by limiting the landlord's right to the standard rent, along with the increases permitted by s. 2 of the Act, and by authorizing the landlord to obtain a rent up to that amount, as was decided, in my opinion, by the case of *Phillips* v. *Copping* (1). In the present case the Master of the Rolls, after stating that the present case fell within the *Bryanston Property Co.'s* case (2), said (3): "It is not a question of importing the "reddendum into the statutory tenancy; it is a separate and "independent term of the tenancy by which, in certain "circumstances, the tenant can get a bonus on punctual "payment." I find myself quite unable to regard the proviso in this case apart from the rent clause of which it is made an integral part, qualifying the obligation to pay rent, in which view the learned judge would evidently have come to a different conclusion. But, further, even if the proviso were to be regarded as a separate and independent term of the

(1) [1935] 1 K. B. 15.

(2) [1944] K. B. 32.

(3) (1944) 60 T. L. R. 519, 520.

tenancy, in my opinion it would still be inconsistent with the provisions of the Act with regard to standard rent, as explained in *Phillips* v. *Copping* (1). It is unnecessary to refer to the case of *Capital and Counties Properties, Ld.* v. *Butler* (2). I am therefore of opinion that the decision in the *Bryanston Property Co.'s* case (3) was wrong, and that the decision in the present case, which followed it, is erroneous. I therefore propose that the appeal should be allowed, and the judgment of the Court of Appeal, except as to costs, and the judgment of the county court judge should be set aside, and the action be dismissed. In accordance with the undertaking given by the appellants to the Court of Appeal, this House should order that the appellants do pay the respondent's costs of this appeal, as between solicitor and client.

LORD RUSSELL OF KILLOWEN. My Lords, Mr. Oxley, in February, 1943, was tenant of Flat number 49 on the terms of the agreement of January 30, 1941. By the terms of that agreement the yearly rent payable was 90*l.*, payable by equal monthly payments of 7*l.* 10*s.* 0*d.* payable in advance, but subject to a proviso (I quote the words)—" that the landlord " shall credit the tenant's account with an additional sum of " 16*s.* 8*d.* upon the tenant paying to the landlord the sum of " 6*l.* 13*s.* 4*d.* within fourteen days of the day on which any " monthly payment of rent ought to be made to the landlord " in accordance with the provisions hereinbefore contained." Apart from all conveyancing technicalities, there can be no doubt of this, that as a result of this proviso, the rent which the tenant is called upon to pay need not exceed 80*l.* per annum. The terms of this contract of tenancy which fix the rent to be paid are such that the rent paid in any year may vary between the limits of 90*l.* and 80*l.*, according to the number of monthly payments made within the fourteen days. On March 29, 1943, Mr. Oxley's tenancy under that agreement came to an end, and he became a statutory tenant at a standard rent under or by virtue of the Rent and Mortgage Interest (Restrictions) Acts, 1920 to 1939. The standard rent was fixed by reference to the rent payable by a former tenant, one Pickles, who held the premises under a tenancy agreement of August 9, 1938, at a rent of 90*l.* The standard rent was 90*l.* increased by an increase of rates payable by the landlord to a sum of

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(1) [1935] 1 K. B. 15.
(2) [1944] K. B. 730.
(3) [1944] K. B. 32.

92*l.* 1*s.* 6*d.* per annum. But although Mr. Oxley's tenancy had become a statutory tenancy, it is provided by s. 15, sub-s. 1, of the Act of 1920 that the tenant "shall, so long as he retains "possession, observe and be entitled to the benefit of all the "terms and conditions of the original contract of tenancy, so "far as the same are consistent with the provisions" of such Act. Mr. Oxley claims to be entitled to the reduction of rent which was given to him by his original contract of tenancy. The sole question seems to me to be whether the proviso is consistent with the provisions of the Act. If it is, the decisions below are right. If it is not, the appellants succeed on this appeal. The proviso in question cannot, as it stands, fit into the statutory tenancy at an annual rent of 92*l.* 1*s.* 6*d.*, but apart from this verbal difficulty, I am of opinion that any term of the original tenancy which, if imported into the statutory tenancy, would or might in any way affect the amount of the standard rent which is fixed by the Act, cannot be treated as a term which is consistent with the provisions of the Act. I doubt whether the technical conveyancing term "reddendum" can properly be applied to such a contract of tenancy as the agreement of January 30, 1941, but if it can, the proviso forms part of it, being a qualification of what has been stated before, changing the fixed rent into a rent variable and ranging between the two limits which I have indicated. I think the true question to ask oneself in a case like this is not whether the term is contained in a reddendum, but will the importation of this term into the statutory tenancy affect in any way the amount of the standard rent which the statute fixes? If it does it is not consistent with the provisions of the Act, and it is not within s. 15, sub-s. 1. I would allow the appeal.

LORD MACMILLAN. My Lords, the notice of February 27, 1943, operated as a notice determining the tenancy. (See the Rent Restrictions (Notices of Increase) Act, 1923, s. 1.) The respondent thereafter occupied the premises by virtue only of the Acts as a statutory tenant; but s. 15, sub-s. 1, of the Act of 1920, provides that a statutory tenant "shall, so long as he "retains possession, observe and be entitled to the benefit of all "the terms and conditions of the original contract of tenancy, "so far as the same are consistent with the provisions of this "Act." The question at issue between the parties is whether the respondent, as he maintains, is entitled to the rebate of 16*s.* 8*d.* monthly for prompt payment as provided in the original contract of tenancy, or whether, as the appellants maintain, the respondent as a statutory tenant is not entitled to the benefit of the rebate as not being a term or condition of the original contract of tenancy which is consistent with the provisions of the statute. I would observe in the first place that the provision for a rebate in the original contract of tenancy is in terms inapplicable to the changed circumstances. It provides that the rebate is to operate " upon the tenant paying to " the landlord the sum of 6*l.* 13*s.* 4*d.* within fourteen days " of the day on which any monthly payment of rent ought to " be made." After the notice of increase of rent became operative, the respondent became liable to pay to the appellants a monthly rent of 7*l.* 13*s.* 5*d.* instead of the original monthly rent of 7*l.* 10*s.*, and a rebate of 16*s.* 8*d.* on the increased rent would reduce it to 6*l.* 16*s.* 9*d.* and not to 6*l.* 13*s.* 4*d.* The rebate was applicable to a monthly rent of 7*l.* 10*s.* and is inapplicable to the increased monthly rent of 7*l.* 13*s.* 5*d.* The rebate of 16*s.* 8*d.* plus a payment of 6*l.* 13*s.* 4*d.* by the respondent would by 3*s.* 5*d.* fall short of the increased monthly rent of 7*l.* 13*s.* 5*d.*

But in any case the provision for a rebate contained in the original contract of tenancy is not in my opinion a term or condition of the original contract which is consistent with the provisions of the Act. Under the Act the landlord is entitled to increase the rent up to any figure which does not exceed the standard rent plus the permitted statutory increases. When he gives a valid notice of increase of rent, the rent from the date when the notice takes effect is the rent specified in the notice. It becomes the statutory rent of the premises and all previous stipulations as to the amount payable cease to have any effect. So far as the monetary position is concerned, the liability of the statutory tenant is fixed and fixed exclusively at the figure stated in the notice which brings the statutory tenancy into existence. I am disposed to agree with the view expressed by Maugham L.J., as he then was, in *Phillips* v. *Copping* (1), where he says of s. 15, sub-s. 1, of the Act of 1920 that the phrase as to the statutory tenant being entitled to the benefits of all the terms and conditions of the original tenancy so far as consistent with the provisions of the Act " is not so " framed as to extend to the case of the payment of rent. " It is not dealing with rent."

The Court of Appeal in the present case had before them their

(1) [1935] 1 K. B. 15, 24, 25.

decisions in two previous cases in which the question arose as to the carrying forward into the statutory tenancy of a provision in the original tenancy agreement for an abatement of rent. (*Bryanston Property Co., Ld.* v. *Edwards* (1); *Capital and Counties Properties, Ld.* v. *Butler* (2).) In the former a provision as to an abatement of rent during the war was held to be imported into the statutory tenancy, while in the latter a similar provision was held not to be carried forward. The distinction which Lord Greene M.R. in the present case draws between the ground of judgment in the former and the ground of judgment in the latter of these previous decisions is, as he says (3), " a fine " one and depends on technicalities of language." I venture to think it is unduly technical and in a matter of this sort, affecting doubtless many small tenancies, it would be unfortunate if each case had to be decided on such technical considerations. In my view, after an effective notice of increase of rent has been given all stipulations in the original contract of tenancy relating to the amount of rent payable are superseded and the statutory tenant must pay the rent which is stated in the notice, no more and no less. This is not an unreasonable result. A landlord may well be disposed to make concessions in the case of a tenant whose tenancy may be terminated at short notice, but it is a different matter to require him to continue these concessions indefinitely to a statutory tenant whose tenancy he cannot terminate except with the sanction of the court under prescribed conditions. I would accordingly allow the appeal.

LORD PORTER. My Lords, this case raises a short question under the Rent Restriction Acts on which I think all your Lordships are agreed. As we are differing from the opinion of the Court of Appeal I express very shortly the reasons for my dissent from their view. The material provision is s. 15, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act of 1920 and it is only necessary to quote the first six lines of that sub-section. They are as follows :—" A tenant " who by virtue of the provisions of this Act retains possession " of any dwelling-house to which this Act applies shall, so long " as he retains possession, observe and be entitled to the benefit " of all the terms and conditions of the original contract of " tenancy, so far as the same are consistent with the provisions

(1) [1944] K. B. 32.
(2) [1944] K. B. 730.
(3) 60 T. L. R. 519, 520.

" of this Act. . . . ." In the present case the respondent has become the statutory tenant of a house of which the standard rent is 90*l.* a year payable by equal monthly instalments of 7*l.* 10*s.* in advance. The provision to this effect in the tenancy agreement is immediately followed by a further provision that on the termination of the original term the tenancy should be a monthly one and then goes on to say, " Provided further that " the landlord shall credit the tenant's account with an " additional sum of 16*s.* 8*d.* upon the tenant paying to the " landlord the sum of 6*l.* 13*s.* 4*d.* within fourteen days of the " day on which any monthly payment of rent ought to be made " to the landlord in accordance with the provisions hereinbefore " contained." The rent which the landlord is now entitled to charge apart from any question of a right to reduction on prompt payment, is 92*l.* 1*s.* 6*d.*, the extra 2*l.* 1*s.* 6*d.* being in respect of increased rates payable by the landlord. This fact, however, I regard as immaterial. In these circumstances the respondent claims that amongst the terms of his original tenancy which have been transported into his statutory tenancy by reason of s. 15 is the provision that his rent should be reduced on punctual payment. The appellants say however that such an importation is inconsistent with the provisions of the Act, inasmuch as there is nothing in it which prohibits the landlord from increasing the rent up to the amount of the standard rent and permitted increases and that amongst the terms and conditions which are to be incorporated into the statutory tenancy, rent is not included. It was accepted by the respondent that s. 15 did not prevent a landlord who had been charging less than the standard rent from raising it to the standard rent, and the decision contained in *Phillips* v. *Copping* (1) was accepted. So was the decision in *Capital and Counties Properties, Ld.* v. *Butler* (2), in which the Court of Appeal held that, in a case where premises having a standard rent of 120*l.* were let subject to one month's notice at 95*l.* during the war and 114*l.* thereafter, the option clause of paying 95*l.* during the continuance of hostilities was not imported into the statutory tenancy. The reasoning of the Court of Appeal in each case was that the terms and conditions referred to in s. 15 did not include the provision in the tenancy agreement as to the amount payable as rent; whatever was pure reddendum was, in this view, unaffected by s. 15, with the result that the full standard rent might be charged to a statutory tenant; to

(1) [1935] 1 K. B. 15.

(2) [1944] K. B. 730.

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decide otherwise would be to incorporate a term inconsistent with the Act. Meanwhile, however, the Court of Appeal had decided in *Bryanston Property Co., Ld.* v. *Edwards* (1) that a provision in an agreement of tenancy permitting the deduction of 85*l.* from the standard rent during the existence of the war, was not part of the reddendum but was imported into the statutory tenancy which came into force when that agreement was determined. My Lords, if I thought that such a term formed no part of the provision determining the rent payable or that the deduction allowed for prompt payment in the case under consideration was a separate term of the agreement, not forming part of the stipulation as to the quantum of rent payable, I should agree with the Court of Appeal. But I do not so regard it. It is to my mind a part and a vital part of the reddendum, it regulates the amount of rent payable and is concerned only with the determination of the rent which shall be payable, the very matter with which the fixing of a standard rent is concerned. If it be a term or condition I think its incorporation amongst the terms of the statutory tenancy would be inconsistent with the provisions of the Act. But I am inclined to think its importation can also be negatived on the grounds which Lord Maugham thought conclusive in *Phillips* v. *Copping* (2)—that the phrase is not so framed as to extend to the case of the payment of rent. I would allow the appeal.

LORD SIMONDS. My Lords, as we are reversing the unanimous decision of the Court of Appeal, I will very shortly add my reasons for doing so. When the appellants served on the respondent the notice dated February 27, 1943, and he remained in possession of the demised premises after the expiration of the notice, he did so under the protection of the Rent Restriction Acts. He became what is conveniently called a statutory tenant. It was the corollary of this that he became liable to pay upon demand the standard rent together with any permitted increases. It is common ground that the standard rent was 90*l.* per annum and that the permitted increases were 2*l.* 1*s.* 6*d.* per annum. Prima facie therefore the respondent became liable to pay a rent of 92*l.* 1*s.* 6*d.* per annum. It is, however, contended by the respondent, and the Court of Appeal has upheld his contention, that by virtue of the provisions of s. 15, sub-s. 1, of the Increase of Rent and Mortgage Interest

(1) [1944] K. B. 32.

(2) [1935] 1 K. B. 15, 24.

(Restrictions) Act, 1920, he can satisfy his obligation in respect of rent by the payment of a lesser sum than 92*l*. 1*s*. 6*d*. The sub-section provides that he "shall, so long as he retains "possession, observe and be entitled to the benefit of all the "terms and conditions of the original contract of tenancy, so "far as the same are consistent with the provisions" of the Act. The "original contract of tenancy" which reserved a rent of 90*l*. per annum payable by equal monthly instalments of 7*l*. 10*s*. in advance contained also a proviso that the landlord should credit the tenant's account with an additional sum of 16*s*. 8*d*. upon the tenant paying the landlord the sum of 6*l*. 13*s*. 4*d*. within fourteen days of the day on which any monthly instalment of rent became due. It is upon this proviso, which is in effect a provision for reduction of rent upon punctual payment, that the respondent relies. It is a term or condition of the tenancy, and he says that it is consistent with the provisions of the Act.

This is the simple issue in the case. The Act in effect says that the tenant shall pay a rent of 90*l*. with permitted increases, which may for this purpose be disregarded: the original contract of tenancy says that he shall pay a rent of 90*l*., with the qualification that it shall be reduced upon punctual payment. Are these two obligations the same or different? If they are different, there is an inconsistency and the obligation imposed by the Act must prevail. It is to my mind clear that they are different. An irreducible rent and a rent reducible in a certain event are not the same thing from the point of view of either landlord or tenant. It cannot, in my opinion, make any difference whether the provision for reduction is found in the so-called reddendum or in some other part of the document. Wherever it is found it operates to qualify a rent which the Act imposes without qualification. The conventional must give way to the statutory provision. The Court of Appeal in the present case followed its earlier decision in *Bryanston Property Co., Ld.* v. *Edwards* (1). It follows from what I have said that that case was, in my opinion, wrongly decided and should be overruled.

Appeal allowed.

Solicitors for appellants: *Hyman Isaacs, Lewis & Mills.*
Solicitor for respondent: *F. E. Clifford.*

(1) [1944] K. B. 32.

[HOUSE OF LORDS.]

H. L. (E.)*

1945

Mar. 12, 13, 14; Apr. 19.

INLAND REVENUE COMMISSIONERS *v.* OSWALD.

Revenue—Income tax—Mortgage of reversionary interest—Capitalization of mortgage interest—Falling in of reversion—Income tax in respect of capitalized interest—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 21.

By deeds executed respectively in 1899, 1901, and 1905, a mortgagor mortgaged her reversionary interest in certain settled funds to secure payment of sums amounting to 3,100*l*. It was provided that interest in arrears might at the option of the mortgagee be capitalized and added to the principal. The mortgagee died in 1920 and the mortgagor in 1933. No interest having been paid after 1906, the mortgagee's trustees in 1935 executed an instrument capitalizing so much of the interest due as was capable of being capitalized. In June, 1938, the reversion fell into possession so that they became entitled to call for payment of principal and interest. The amount available was sufficient to discharge the principal, leaving only 4,399*l*. available to discharge arrears of interest. In September, 1938, the mortgagee's trustees executed a further instrument of capitalization. In 1940 the respondent, the surviving trustee of the settlement, handed over the whole of the funds remaining in his hands to the mortgagee's trustees, who claimed that there was owing to them a total sum of 8,301*l*., calculated on a net capitalization basis, i.e., after deduction of income tax. The revenue claimed that the respondent was assessable under r. 11 of the All Schedules Rules, Income Tax Act, 1918, for the income tax chargeable in respect of the sum of 4,399*l*. :—

Held (1.) that the unpaid interest was not paid within the meaning of r. 21 by virtue of the instruments which capitalized it, and (2.) that whatever was paid out of the available fund to the mortgagee's trustees over and above the original capital loans was in law a payment of interest and, not being made out of profits or gains brought into charge, must suffer deduction of income tax, the payer being accountable to the Inland Revenue for the tax so deducted.

Inland Revenue Commissioners v. *Lawrence, Graham & Co.* [1937] 2 K. B. 179, overruled.

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal.

The facts, stated by Lord Thankerton, Lord Macmillan and Lord Porter, were as follows: in 1899, Mrs. Elfrida Beyfus, the mortgagor mortgaged a reversionary interest to which she was entitled under a deed of settlement, dated June 8, 1885, the settlement of R. W. Cosier, to Mrs. Emma Louise Liberty, afterwards Lady Liberty, the mortgagee, to secure the sum of 2,300*l.* borrowed from her with interest at five per cent. per annum by equal quarterly instalments. In 1901 the mortgagor further charged her reversionary interest to the mortgagee to secure a further advance of 500*l.* with interest at five per cent per annum by equal quarterly instalments. This interest was paid up to May 18, 1905. On January 10, 1905, the mortgagor assigned to Jonas Wolfe and certain other parties the sum of 500*l.*, part of her reversionary interest, but subject to the mortgages of 1899 and 1901. On May 18, 1905, the mortgagor executed a further charge of her reversionary interest to the mortgagee to secure a further advance of 300*l.*, and it was thereby provided that interest on the three sums of 2,300*l.*, 500*l.* and 300*l.* should thenceforth be paid at the rate of five and a half per cent. per annum, subject to a proviso for the reduction of the rate to five per cent. on punctual payment. This further charge contained the following provision :—" And it is hereby further agreed and declared " that all interest which shall fall due on the said sums of " 2,300*l.*, 500*l.* and 300*l.* whether by virtue of the foregoing " covenants or the covenants contained in the hereinbefore " recited indentures and shall not be paid within twenty-one " days after the dates thereby and hereby appointed for " payment thereof may at the option of the mortgagee be " capitalized as from such last mentioned appointed date and " be added to the principal moneys hereby secured so as to " form one aggregate sum charged on the property hereby " mortgaged and carrying interest at the rate aforesaid " and the mortgagor doth hereby covenant with the mortgagee " to pay to the mortgagee the interest on such capitalized " interest at the rate aforesaid on the aforesaid days therein- " before and herein appointed for payment of interest and " nothing in this proviso contained shall prevent the mortgagee " notwithstanding the capitalization of the interest from " subsequently exercising all the rights powers and privileges " of a mortgagee as if the interest had not been paid or " capitalized and it shall be lawful for the mortgagee to treat " a portion of the interest as capitalized and a portion as if no " option as aforesaid had been expressed by the mortgagee." Interest was paid on the advances up to August 18, 1906, but after that date no interest was paid. The mortgagee died on May 2, 1920, and the borrower died on January 11, 1933.

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* *Present:* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD PORTER and LORD SIMONDS.

No representation was taken out to the estate of the mortgagor, who left no estate other than the equity of redemption in the reversionary interest which she had mortgaged, but the will and codicils of the mortgagee were duly proved by H. C. Blackmore and V. W. G. Ranger, the surviving executors nominate. On August 9, 1935, the mortgagee's trustees, executed an instrument whereby, in exercise of the power conferred by the indenture of further charge dated May 18, 1905, they capitalized as from May 18, 1935, " so much of the interest fallen due on " the principal sums of 2,300*l.*, 500*l.* and 300*l.* . . . . as is now " capable of being capitalized " and added " the interest so " capitalized to the principel sums so as to form one aggregate " sum charged on the property mortgaged by the said indenture " of further charge and carrying interest at the rate thereby " provided." On September 13, 1938, the mortgagee's trustees executed a further instrument under which they capitalized in similar terms, as from August 18, 1938, " so much of the " interest fallen due on (*a*) the principal sums of 2,300*l.*, 500*l.* " and 300*l.* . . . . and on (*b*) the interest thereon previously " capitalized as is now capable of being capitalized by virtue " of the provisions " of the further charge dated May 18, 1905. The mortgagor's reversionary interest in the Cosier settlement, then in the hands of the respondent, as sole surviving trustee thereof, fell into possession on June 29, 1938. After paying all proper charges and expenses the fund available in satisfaction of the mortgage was 7,438*l.* 12*s.* 5*d.* The sum, as appropriated by the mortgagee's trustees, in accordance with the agreement hereafter mentioned, was sufficient to repay the three principal sums in full and to leave a balance to meet in part the accrued interest. The mortgagee's trustees claimed that there was owing to them a sum of 8,301*l.* 8*s.* 2*d.*, and this they calculated first by taking simple interest on the 3,100*l.* from August 18, 1906, to May 18, 1935, deducting the appropriate amount of income tax due from year to year and capitalizing the balance and adding it to the original debt, and secondly, by treating the sum so capitalized in a similar manner up to August 18, 1938, and then capitalizing the balance of interest as before. After that date interest less tax was charged on the final sum so capitalized, but no further capitalization was resorted to. The Inland Revenue authorities claimed that, before making payment to the mortgagee's trustees, the respondent ought to deduct and pay income tax on the interest capitalized. The mortgagee's trustees disputed this contention and, following negotiations, an agreement in writing was come to between the two sets of trustees on July 20, 1939. By that document it was agreed that, after deducting certain proper charges and expenses out of the fund, the respondent should transfer the residue to the mortgagee's trustees to be appropriated in payment of (1.) all proper costs, charges and expenses, (2.) the capital sums of 2,300*l.*, 500*l.* and 300*l.*, making 3,100*l.* in all, and (3.) all interest (including capitalized interest) owing under the mortgages. A further term of this agreement was that one-half of the funds so appropriated should forthwith after such appropriation be placed in the joint names of the two sets of trustees as a security for the complete indemnity of the respondent, personally undertaken by the mortgagee's trustees, against all claims by the Crown and all costs of the respondent in connexion with such claims. In pursuance of this agreement on various dates in January and February, 1940, the respondent handed over to the mortgagee's trustees all the funds (both capital and interest) then remaining in his hands (i.e., securities, valued at 7,438*l.* 12*s.* 5*d.*, and specified in the schedule, and 166*l.* 6*s.* 6*d.* cash representing income), and one-half thereafter stood in the name of the mortgagee's trustees and the other half in the joint names of the two sets of trustees. The appropriation was as follows:

	£	*s.*	*d.*
" (1.) To costs of the [mortgagee's] trustees ..	105	15	10
" (2.) To repayment of the principal sum ..	3,100	0	0
" (3.) To interest thereon (including capitalized interest)	4,399	3	1."

An assessment to income tax for the year ended April 5, 1940, was made on the respondent, as sole surviving trustee of the Cosier settlement, in the sum of 6,500*l.* in respect of the tax alleged to be deductible by him under r. 21 of the General Rules applicable to All Schedules of the Income Tax Act, 1918, on his paying over to the mortgagee's trustees the available fund in his hands so far as representing arrears of interest. The Special Commissioners discharged the assessment on the ground that the case was ruled by the decision of the Court of Appeal in *Inland Revenue Commissioners* v. *Lawrence, Graham & Co., Ld.* (1). On a case stated Macnaghten J. and the Court of Appeal affirmed the decision of the Special Commissioners, also holding that the case was governed by the decision in that case. The Commissioners of Inland Revenue appealed to the House of Lords.

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(1) [1937] 2 K. B. 179.

Sir Donald Somervell A.-G., J. H. Stamp and *R. Hills* for the appellants. The respondent was rightly assessed to income tax as the person by or through whom interest was paid out of a capital fund to the representatives of the mortgagee's estate. Despite the capitalizations the arrears of interest never lost their character of interest and accordingly, the respondent, when making payment to the mortgagee's trustees of the proceeds of the mortgagor's reversionary interest, is bound to deduct income tax on the part of the sum which represents arrears of interest. Tax can only be deducted when there is an actual payment to the trustees. There must be deducted a sum equivalent to tax at the rate then in existence on so much of the fund as is rightly appropriated to interest, including capitalized interest. On the capitalizations no interest was in fact paid by anyone from which tax could be deducted. What was called capitalization was not a payment of interest and the interest remained unpaid. Accordingly, the appellants' simple contention is that the case should be dealt with on the basis that the interest is being paid by the respondent: see *In re Morris. Mayhew* v. *Halton* (1); *In re Jauncey. Bird* v. *Arnold* (2); *Cross* v. *London & Provincial Trusts, Ld.* (3), and *Hunter* v. *The King* (4). *Paton* v. *Inland Revenue Commissioners* (5) provides the true explanation of the effect of capitalization in this case, namely, that the interest is capitalized, not because it is in fact paid but because it has in fact not been paid. Assuming that the decision in *Inland Revenue Commissioners* v. *Lawrence, Graham & Co.* (6), by which the Court of Appeal held itself bound in the present case, is right, the reasoning in it is applicable only to cases in which the agreement provides for capitalization of the net sum, whereas in the present case the agreement does not so provide. In this case the capitalization was not rightly calculated, and the gross sum of interest, arrived at without deducting an amount of income tax in respect of each year, should have been found. However, *Inland Revenue Commissioners* v. *Lawrence, Graham & Co.* (6) was wrongly decided and should be overruled. It implies that agreement between the parties can produce the same effect as the application of r. 21, and that this can be done by reducing the amount capitalized. But if there were a payment of interest no form of words could exclude the full operation of r. 21.

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(1) [1922] 1 Ch. 126.
(2) [1926] 1 Ch. 471.
(3) [1938] 1 K. B. 792.
(4) [1904] A. C. 161.
(5) [1938] A. C. 451.
(6) [1937] 2 K. B. 179.

Tucker K.C. and *Scrimgeour* for the respondent. On the true construction of the deed of 1905 the interest, which might at the mortgagor's option be capitalized, and added to the principal moneys, was only the net interest which the borrower was liable on the due date to pay in cash to the mortgagee. The provision for capitalization should not be construed as entitling the mortgagee to add to principal and so obtain further interest on that proportion of the interest which the borrower would have been entitled or bound to deduct in respect of income tax if she had in fact paid the interest in cash on the due dates. "Payment" under rr. 19 and 21 of the All Schedules Rules, which cannot be read in a narrow sense, must mean more than payment in cash or legal tender. A bill of exchange may be received in satisfaction of a net amount. Payment may be by means of a set off or a supervening agreement to accept something other than legal tender of the sum due. The agreement may provide for the acceptance in satisfaction of any form of property or any right against the debtor which would in law be good consideration for the discharge of a debt. The debtor can properly say to the creditor: "I owe you X*l*. "Will you take something in substitution?" If the creditor agrees, the debt is discharged and there is a new obligation. That transaction in such a case as this gives rise to a right and duty of deduction of tax. The deduction is calculated on the sum which would have been paid if the interest debt had been satisfied in cash. In such a case there is no need to put 100*l*. in notes on the table, paying 50*l*. and taking back 50*l*. Deduction in account is different. *Inland Revenue Commissioners* v. *Lawrence, Graham & Co.* (1) was rightly decided and is not inconsistent with *Paton* v. *Inland Revenue Commissioners* (2), and is indistinguishable from the present case. There it was held that on the capitalization of each instalment of interest the borrower and the mortgagee should be deemed to have agreed that a capital charge for the net amount of the interest less tax should be accepted by the mortgagee in full satisfaction for the sum due by way of interest. This amounted to payment at the date of capitalization, and in making the payment those who made it were obliged to deduct tax at the rate then due. The payment must be taken to have been made as and when the interest fell due by the person then owing the interest, i.e., either the borrower or those representing her estate. Certainly until after the reversionary interest fell in, it could not be the respondent or his predecessors as trustees of the Cosier estate. These trustees in transferring to the mortgagee's trustees so much of the assets in their hands as was applicable to the payment of interest were handing over a sum from which tax had already been deducted. They received and paid a tax-free asset and did not become liable for the tax notionally deducted. The respondent was never under any obligation to pay interest; he was not paying a debt of his own. His only obligation was to hand over the property to the persons entitled to it. The rest of the estate of the deceased borrower, had there been any, would have been liable for the tax. Moreover, the respondent was not, in any event, a " person by or through whom " any payment of interest was made, within the meaning of r. 21. He merely handed over the securities specified in the schedule to the agreement of July, 1939. He did not hand over money and so could not deduct tax. Furthermore, the appellant's general contention would lead to difficulties in reconciling these provisions with the surtax provisions in the Finance Acts. [They referred to *Inland Revenue Commissioners* v. *Holder* (1); *Holder* v. *Inland Revenue Commissioners* (2); *Earl of Caernarvon* v. *Inland Revenue Commissioners* (3); *Marland* v. *Inland Revenue Commissioners* (4); *Inland Revenue Commissioners* v. *Cull* (5); *Cross* v. *London & Provincial Trusts, Ld.* (6); *Rhokana Corporation, Ld.* v. *Inland Revenue Commissioners* (7); *O'Callaghan* v. *Newstead* (8); *Allchin* v. *Coulthard* (9); *In re Sebright. Public Trustee* v. *Sebright* (10); *In re Morris. Mayhew* v. *Halton* (11); *Raghunandan Prasad Singh* v. *Income Tax Commissioner* (12); *Income Tax Commissioner* v. *Maharajadhiraja of Darbhanga* (13); and the Income Tax Act, 1918, s. 1; sch. D., para. 1 (*a*); All Schedule Rules, rr. 19, 21, 23, sub-r. 2; the Finance Act, 1927, ss. 38, 39, and the Finance Act, 1938, s. 25.]

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(1) [1937] 2 K. B. 179, 195.

(2) [1938] A. C. 341.

(1) [1931] 2 K. B. 81.
(2) [1932] A. C. 624.
(3) (1934) 19 Tax Cas. 455.
(4) Ibid. 624.
(5) [1938] 2 K. B. 109, 126.
(6) [1938] 1 K. B. 792.
(7) [1938] A. C. 380.
(8) (1940) 23 Tax Cas. 535, 538.
(9) [1943] A. C. 607.
(10) [1944] Ch. 287.
(11) [1922] 1 Ch. 126.
(12) (1933) L. R. 60 I. A. 133.
(13) Ibid. 146.

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Sir Donald Somervell A.-G. in reply. A deduction of tax cannot be made under r. 21 unless there is a fund or some expectation of a fund to meet the tax. The rule proceeds on the footing that the whole payment can be made. In *Inland Revenue Commissioners* v. *Cull* (1), Greene M.R. was dealing with r. 19 and not r. 21. The effect of the agreement of 1939 was not to absolve the respondent from liability. The intention of the parties was to protect him in respect of his possible liability, not to do anything to preclude deduction and payment of the tax. [He referred to *Raghunandan Prasad Singh* v. *Income Tax Commissioner* (2).]

THE HOUSE took time for consideration.

April 19. LORD THANKERTON (read by LORD MACMILLAN). My Lords, this appeal arises on a case stated by the Special Commissioners, who had discharged an assessment to income tax for the year ended April 5, 1940, on the respondent, as sole surviving trustee of the Cosier settlement, in the sum of 6,500*l.*, made under r. 21 of the General Rules applicable to schedules A, B, C, D and E of the Income Tax Act, 1918. The decision of the Special Commissioners has been affirmed in both courts below. The main question is whether by virtue of the two instruments dated August 9, 1935, and September 13, 1938, whereby the mortgagee's trustees exercised the option conferred by the indenture of further charge dated May 18, 1905, the unpaid interest so capitalized was paid within the meaning of r. 21 of the General Rules applicable to all schedules, the material part of which provides as follows, " (1.) Upon payment " of any interest of money, annuity or other annual payment " charged with tax under sch. D, or of any royalty or other sum " paid in respect of the user of a patent, not payable, or not " wholly payable out of profits or gains brought into charge, the " person by or through whom any such payment is made shall " deduct thereout a sum representing the amount of the tax " thereon at the rate of tax in force at the time of the payment." The Special Commissioners, Macnaghten J. and the Court of Appeal have all held that the present case is ruled by the decision of the Court of Appeal in *Inland Revenue Commissioners* v. *Lawrence, Graham & Co.* (3), which has not been previously considered by this House. The Crown challenge

(1) [1938] 2 K. B. 109, 126.

(2) L. R. 60 I. A. 133, 135, 143.

(3) [1937] 2 K. B. 179.

the correctness of that decision, and I shall now deal with it. That case related to a mortgage and two further charges on the security of a reversionary interest; the mortgage contained a provision for the automatic conversion of unpaid half-yearly interest into principal money, carrying interest. Except that the clause operated automatically instead of resting on the optional exercise of a power, as in the present case, I find no material difference between the cases as regards the present question, nor can I see that that difference affects the decision of the present question. In both cases the Court of Appeal considered on construction whether the sum to be capitalized was the gross amount of interest or the net sum—i.e., after deduction of income tax, and in both cases the Court of Appeal has held that it was the net sum. But, my Lords, it seems to me, with all respect to the learned judges, to be idle to consider that question until and unless you have found that there was a payment of interest within the meaning of r. 21 at the time of the capitalization, as otherwise you cannot find " the amount of the tax thereon at the rate of tax in force " at the time of the payment." In *Lawrence, Graham & Co.'s* case (1) the judgment of the court (Lord Wright M.R., Romer and Greene L.JJ.) was delivered by Romer L.J. and it will suffice to quote one passage from the judgment (2): " Turning " once more to the rule it will be seen that it imposes on every " such person an obligation to deduct out of the interest a " sum representing the tax thereon. It is plain that this does " not necessitate the actual setting aside of cash to meet the " tax. A deduction in account is sufficient. If instead of " paying the full amount of the interest the debtor pays to " his creditor the interest less the tax, he has fulfilled his " obligation, even though the payment exhausts his cash in " hand or, if paid by cheque, leaves nothing standing to his " credit at his bankers. So long as the net interest and no more " reaches the hands of the creditors the Crown has no cause for " complaint. Nor can the Crown be concerned with the form " in which the net interest reaches the hands of the creditor. " The creditor may, if he thinks fit, agree to accept in full " satisfaction of the net amount a bill or a bond or a chattel " provided that the money value of what he gets in exchange " does not exceed the net interest due. If this be so, a " mortgagor and a mortgagee may validly agree that, in the " event of failure by a mortgagor to pay the net interest as it

(1) [1937] 2 K. B. 179. (2) Ibid. 195.

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"falls due, the mortgagee will from time to time accept in full "discharge of the mortgagor's liability to pay it a capital "charge for a like amount upon the mortgage security. As and "when each charge takes effect the tax will have been deducted "within the meaning of the rule, for the capital charge merely "takes the place of a payment by the mortgagor of the net "amount and can never exceed that net amount in money "value. In our judgment the arrangement that was made "between the mortgagor and the society in the present case "was of that nature." My Lords, I am not concerned in the present case to consider the first part of this passage in the suggestion that the debtor, if he have only enough money to pay the net amount, is entitled to pay it all to the creditor, having made the prescribed deduction from an amount which he does not possess. It is clear that the interest due may be paid in money's worth in such a way as to discharge the debtor's liability for the interest. But I find myself quite unable to agree that the debtor's liability for the interest was discharged as the result of the arrangement between the mortgagor and the society in that case. I cannot but think that the learned judges did not sufficiently bear in mind the distinction between debt and security. In my opinion there was no discharge of the debtor's liability for the overdue interest and the result of the arrangement was the improvement of the security, and an increased liability for interest by the overdue interest being made to carry interest. The same result was effected in the present case by the exercise of the option conferred by the indenture of further charge dated May 18, 1905. Accordingly, I am of opinion that *Lawrence, Graham & Co.'s* case (1) was wrongly decided. Though Lord Greene M.R. thought otherwise in the present case, I am of opinion that this case falls within the principle of the decision of this House in *Paton* v. *Inland Revenue Commissioners* (2), in which it was held that the practice of banks to add interest to principal by half-yearly rests did not constitute as between the bank and its customer a payment of interest by the customer within the meaning of s. 36, sub-s. 1, of the Act of 1918, so as to entitle the trustee of the customer's estate to recover the amount of income tax thereon. As my noble and learned friend Lord Macmillan states (3): "It is a condition of a claim for repayment "of tax on bank interest under s. 36, sub-s. 1, that the taxpayer

(1) [1937] 2 K. B. 179.
(2) [1938] A. C. 341.
(3) Ibid. 341, 356.

"shall have 'paid' to his bank the interest in respect of which "he claims repayment of tax. In my opinion this means that "the taxpayer must really, and not merely notionally, have "have paid the interest; there must be payment such as to "discharge the debt; the payment must be a fact not a "fiction." I may add three dicta which appear to me well to describe the substance of the transaction presently under consideration. First, from the judgment of Lord Sterndale M.R. in *In re Morris. Mayhew* v. *Halton* (1): "When "these sums of interest come to be paid at the end of the time, "when payment is made, although interest has been charged "upon them, and, although as a matter of bookkeeping, they "have from time to time been added to capital, they do not "cease to be interest of money—that is to say, they are overdue "interest upon which interest has been paid." Secondly, a sentence from the judgment of my noble and learned friend Lord Russell of Killowen—then Russell J.—in *In re Jauncey. Bird* v. *Arnold* (2): "In the case of such a provision as is "contained in the present deed, which enables the interest to "be capitalized, the interest is not capitalized because it is in "fact paid, but because it has in fact not been paid." Thirdly, a passage from the judgment of the Privy Council in *Raghunandan Prasad Singh* v. *Income Tax Commissioners* (3), which was delivered by my noble and learned friend Lord Macmillan, and which in my opinion, is equally applicable in the law of England. In 1904 a new mortgage had been accepted for an amount which included both the principal and the arrears of interest due under a previous mortgage of 1894, which was then discharged. The question was whether the mortgagees had thereby received payment of the arrears of interest; if so, the assessment appealed against would be out of time, but this view was rejected by the Board. Lord Macmillan said: "Their Lordships are of opinion that there was in the circum"stances no realization of the principal and interest of the "original mortgage of 1894, and that when the assessees "received the new mortgage for Rs. 7,33,135, which included "the principal and interest of the original mortgage, they did "not thereby receive payment, or the equivalent of payment, "of the principal and interest of the original mortgage. "No doubt the grantors of the new mortgage were not identical "with the grantor of the original mortgage and the property

(1) [1922] 1 Ch. 126, 133.

(2) [1926] Ch. 471, 476.

(3) L. R. 60 I. A. 133, 138, 139.

"mortgaged was greater in extent, but the substitution effected "cannot in any real sense be described as the equivalent of a "realization of the original mortgage, principal and interest. "What happened was that the assessees received a new and "substituted security for an existing debt. To give security "for a debt is not to pay a debt. If the assessees had received "payment in kind of the amount outstanding on the original "mortgage, in the shape, say, of realizable shares or bonds, the "case would have been different, but they merely received "further and better security for their debt. It is, in their "Lordships' view, quite immaterial that the assessees discharged the original mortgage and all liability under it, "for that was merely an incident in the transaction whereby "the new security was substituted for the old." Accordingly, I am of opinion that there was no payment of interest within the meaning of r. 21, by virtue of the two instruments dated respectively August 9, 1935, and September 13, 1938, executed by the mortgagee's trustees.

The respondent submitted a further contention that he was not a person by or through whom any such payment was made within the meaning of r. 21, on the ground, as I understood, that he was merely handing over the investments specified in the schedule to the heads of agreement dated July 20, 1939. This contention is clearly untenable, as the heads of agreement make provision for the Crown's claim against the respondent and provide for the retention of one half of these investments in joint names as a security for the indemnification of the respondent, personally undertaken by the mortgagee's trustees, against all claims by the Crown and all costs by the respondent in connexion with such claim. I am therefore of opinion that the appeal succeeds, that the judgments appealed against should be set aside, and that the assessment should be upheld, subject to adjustment of the figures in accordance with the decision of this House. The case should be remitted to the Special Commissioners for that purpose. I move accordingly.

LORD RUSSELL OF KILLOWEN. My Lords, I have had an opportunity of reading and considering the opinions of my noble and learned colleagues in this case. Being in agreement with them, I do not find it necessary to say anything except that I concur in the motion which is proposed.

LORD MACMILLAN. My Lords, the appellants, the Inland

Revenue Commissioners, maintain that notwithstanding the exercise by the mortgagee's trustees of the option of capitalizing unpaid interest, the arrears of interest have never lost their character of interest and that the respondent, the surviving trustee under the settlement, is bound, when making payment to the mortgagee's trustees of the proceeds of the mortgagor's reversionary interest, to deduct and account for income tax on the part of the sum which represents arrears of interest. The respondent resists this claim on grounds which I shall indicate later but which I may compendiously describe as the ratio decidendi of the case of *Inland Revenue Commissioners* v. *Lawrence, Graham & Co.* (1).

Before considering the validity of the claim for the appellants it is in my view essential to ascertain first the nature and effect of the contracts between the mortgagor and the mortgagee. The revenue authorities are not parties to these contracts, which make no reference to their claims. They stand, as it were, outside and intervene only in virtue of their statutory rights. Now, for myself and apart from the highly sophisticated arguments in which the matter has become involved, I should have thought, as indeed I do think, that the contractual position as between the parties to the mortgages was quite plain. Interest at five and a half per cent. is stipulated for on the three capital sums advanced. If the interest is punctually paid five per cent. will be accepted. If the interest is not paid as it falls due the mortgagee has an option to capitalize it and add the interest so capitalized to the principal sums, the aggregate then carrying interest at the rate of five and a half per cent. If there were no option to capitalize, or the option were not exercised, the arrears of unpaid interest at the stipulated rate would accumulate at simple interest. The option to capitalize is an option to exact compound interest. The effect of an agreement to pay compound interest or to "capitalize" interest is stated with perfect clarity by Lord Sterndale M.R., in *In re Morris* (2), a statement with which I entirely concur. Such an agreement merely means that the interest at the stipulated rate as it falls due if it remains unpaid is added to the borrower's indebtedness and itself yields interest at the stipulated rate. It is of course true that if the interest were duly paid the borrower would be entitled or bound, when making payment, to deduct income tax and the lender would be bound to grant a discharge for the full amount of the stipulated

(1) [1937] 2 K. B. 179.

(2) [1922] 1 Ch. 126, 131, 132, 133.

interest on receiving that amount less income tax. But if the interest is not paid no right or duty to deduct tax arises. The unpaid interest accumulates at the stipulated rate. In the case of a provision " which enables the interest to be capitalized, " the interest is not capitalized because it is in fact paid, but " because it has in fact not been paid," as was said by my noble and learned friend Lord Russell of Killowen, then Russell J., in *In re Jauncey* (1). It is because the interest has not been paid that the rate of five and a half per cent. is applicable. At the end of the day, if funds become available through the realization of the security for payment of the borrower's indebtedness for principal and interest, then in paying the part of the indebtedness which consists of accumulated unpaid interest the right or duty to deduct tax emerges, but not till then. The unpaid interest never ceases to retain its character as interest, although it has from time to time been added to the capital indebtedness and has carried interest in turn. All this seems to me, I confess, reasonably clear and is in exact consonance with Lord Sterndale's view as expounded in *In re Morris* (2). But the respondents have argued strenuously that this is not a true analysis of the situation and they invoke the authority of the judgment of the Court of Appeal in *Lawrence, Graham & Co.* (3). Lest I do injustice to the respondents' main contention I shall state it in the words of the third reason appended to their printed case, which reads as follows :—" Because, as held by the Court of Appeal in the " case of *Commissioners of Inland Revenue* v. *Lawrence, Graham* " *& Co.* (3), on the capitalization of each instalment of interest " the borrower and the mortgagee should be deemed to have " agreed that a capital charge for the net amount of the interest " less tax should be accepted by the mortgagee in full satisfac- " tion for the sum due by way of interest." If this be accepted as an accurate statement of the import of the judgment of the Court of Appeal in *Lawrence, Graham & Co.* (3), I agree that it would assist the respondent's contention. But the Crown maintains that that judgment was erroneous, and has brought the present appeal with the avowed object of arguing that it should be overruled. It will be observed that the respondents in their reason which I have quoted do not in terms state that in a question with the inland revenue the interest must be held to have been *paid* on capitalization. I do not see how they could have said so consistently with the judgment of this House

(1) [1926] Ch. 471, 476.
(2) (1922) 1 Ch. 126, 131, 132, 133.
(3) [1937] 2 K. B. 179.

in *Paton* v. *Inland Revenue Commissioners* (1). That was a case under s. 36, sub-s. 1, of the Income Tax Act, 1918, whereas the present case is under r. 21 of the General Rules Applicable to All Schedules under the Act, but the condition precedent of the operation of s. 36, sub-s. 1, and of r. 21 is the same. The former applies where interest is " paid " to a bank, the latter applies " upon payment of any interest." In each case therefore the first thing to ascertain is whether there has in fact been any payment of interest. Now in *Paton's* case (1) it was sought to be made out that the bank by the accumulation of interest with capital on a loan account at half yearly intervals had in effect been paid the interest as it accrued. The House rejected this argument. Construing the word " paid " I said (2) that : " In my opinion this means that the taxpayer must really, " and not merely notionally, have paid the interest ; there " must be payment such as to discharge the debt ; the payment " must be a fact not a fiction." I adhere to this opinion and I am equally satisfied that the word " payment " in r. 21 has the same effect. With much respect, I think that the reasoning of Romer L.J. in delivering the judgment of the Court of Appeal in *Lawrence, Graham & Co.* (3), is based on a misconception. He proceeds on the view that the contract between the parties provided for the capitalization not of the stipulated interest but of the interest less tax and that is also the contention of the respondent in this case. As I have said I do not so read the contract in the present case and I should not have so read the contract in *Lawrence, Graham & Co.* (4). I can see no right or duty to deduct tax except when interest is paid and it is not paid when it is accumulated. There is a manifest confusion between what the lender must accept on payment and what is due. The lender must discharge the borrower's obligation to pay interest at the stipulated rate on being paid that interest less tax, but it is quite a different thing to say that what is due under the contract is the stipulated interest less tax. The contract fixes the rate of interest, the Income Tax Act creates a supervening right or duty to deduct tax. To say the least, the validity would be doubtful of such a contract as Romer L.J. suggests in *Lawrence, Graham & Co.'s* case (5), whereby the lender agrees to accept in lieu and in discharge of the unpaid stipulated interest an additional capital charge of an amount equivalent to the unpaid interest less tax. At any rate that is not in my opinion the legal effect of the contract which your Lordships have to construe in the present appeal. I do not wonder that the respondent shrank from saying that the " capitalized " interest was " paid " on capitalization of a sum equal to the interest under deduction of tax, for if there was payment of interest less tax then, this being a r. 21 case, it would have been the duty of the payer, presumably the mortgagor, to deliver to the Commissioners of Inland Revenue " an account of the payment . . . . and of the " tax deducted out of the payment " with a view to the assessment of the payer. Nothing of the kind was done. It so happens in the present case that the amount of the fund now available towards satisfying the mortgages is not sufficient after paying the original principal sums to provide enough to pay in full the arrears of interest whether those arrears are calculated on a net or a gross basis. But in my opinion whatever is paid now out of the available fund to the mortgagee's representatives over and above the original capital loans is in law a payment of interest and not being made out of profits or gains brought into charge must suffer deduction of income tax, the payer being accountable to the inland revenue for the tax so deducted.

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(1) [1938] A. C. 341.
(2) Ibid. 356.
(3) [1937] 2 K. B. 179, 195.
(4) Ibid. 179.
(5) Ibid. 195.

A point was taken on behalf of the respondent that he was not the person " by or through whom " the interest was payable. So far as I understand the argument it was based on the terms of the agreement under which the available fund has been handed over to the mortgagee's trustees. But the fund so far as required to meet arrears of interest stands in the joint names of the parties. There is no substance in the point. In my opinion your Lordships should overrule the judgment of the Court of Appeal in the case of *Lawrence, Graham & Co.* (1), and allow the present appeal. The case will have to be remitted in order that the amount of the assessment on the respondent may be adjusted.

LORD PORTER (read by LORD SIMONDS). My Lords, the mortgagee's trustees claimed that there was owing to them a sum of 8,301*l.* 8*s.* 2*d.*, and this they calculated firstly by taking simple interest on the 3,100*l.* from August 18, 1906, to May 18, 1935, deducting the appropriate amount of income tax due from year to year and capitalizing the balance and adding it to the original debt and secondly, by treating the sum so capitalized

(1) [1937] 2 K. B. 179.

in a similar manner up to August 18, 1938, and then capitalizing the balance of interest as before. After that date interest less tax is charged on the final sum so capitalized but no further capitalization is resorted to. Some question was raised by the Crown as to whether the capitalization was rightly calculated, and whether the gross sum of interest without deducting the appropriate amount of tax should not have been included in the final amount instead of the nett amount less tax, but whichever principle is adopted the sum available for answering the debt is less than what is due and having regard to the view which I hold it is unnecessary to consider which calculation is the correct one. In either event the mortgagee's trustees will get less than the sum they are owed. The inland revenue authorities claimed that before making payment to the mortgagee's trustees the respondent ought to deduct and pay income tax on the interest capitalized as aforesaid and on the interest on that interest. The mortgagee's trustees disputed this contention.

The question therefore arises whether the respondent on paying the principal sum due was under an obligation to deduct some and what sum to answer the claim of the Crown for income tax. The solution depends primarily on the construction of r. 21 of the General Rules applicable to schedules A, B, C, D and E, which are contained in the First Schedule to the Finance Act, 1918. Leaving out unnecessary expressions, that rule runs as follows: "(1.) Upon payment of any interest "of money . . . . not payable . . . . out of profits or gains "brought into charge the person by or through whom any such "payment is made shall deduct thereout a sum representing "the amount of the tax thereon at the rate of tax in force at "the time of the payment." Sub-r. 2 enacts that the person so deducting shall forthwith render an account to the commissioners of the amount so deducted. The deduction is to be made "upon payment" and similarly r. 19 which deals with annual payments out of profits or gains brought into charge to tax permits deduction on making the payment, though in that case the deduction is optional, not compulsory, and the deduction is of tax at the rate or rates of tax in force during the period through which the payment was accruing due, not at the rate in force at the time of payment. In each case, if the deduction is made, its maker is assessed on the amount so deducted. The Crown in these circumstances contended that the compulsory deduction required by the statute could only take place at the moment when actual payment was made to the mortgagee's trustees and that the appropriate sum to be deducted was a sum equivalent to tax at the rate then in existence on so much of the fund as was rightly appropriated to interest (including capitalized interest). The respondent, as I understood, agreed that tax was deductible only on payment, but said that the capitalization of interest under the terms of the mortgage deeds amounted to payment as each sum of interest became due, or at any rate at the date of capitalization, and that in making this payment the tax must be taken to have been deducted, by those who made the payment, at the rate then due. He went on to contend that the payment must be taken to have been made as and when the interest became due by the person then owing the interest and that this was either Mrs. Beyfus or those representing her estate and was not, at any rate until after the reversionary interest fell in, the respondent or his predecessors as trustees of the Cosier estate. In support of his argument the respondent relied principally on the decision in *Inland Revenue Commissioners* v. *Lawrence, Graham & Co.* (1). That case like the present dealt with the liability of trustees of a reversionary interest to pay income tax on the sum available for payment of interest which had passed through their hands on its way to the mortgagee when the reversionary interest fell in. Two points were decided. It was held (1.) that the capitalization of interest from time to time did not constitute a payment or payments of the interest by the notional making of a further loan from the mortgagee to the mortgagor which was then added to the capital sum due. The case of *Inland Revenue Commissioners* v. *Holder* (2) (affirmed in your Lordships' House on another ground : *Holder* v. *Inland Revenue Commissioners* (3)) was distinguished on the ground that principles applicable to the capitalization of interest by bankers did not apply to interest due on a mortgage debt ; but (2.) that the agreement for capitalization followed by capitalization, either because the mortgage deed provided for that result following or because an option was given by it to capitalize by the mortgagor, did amount to payment, since there was an agreement to substitute this capital charge for payment in cash. It was held, however, that the obligation was only to pay a net sum, viz. the gross sum due less tax ; the net sum therefore and not the gross sum should be added to the capital and the borrower must be taken to have deducted on each occasion the amount due for tax. The judgment goes on (1): "This being so, when "the respondents paid to the society out of the purchase money "the sums that had been so added to the principal moneys "secured, they were paying a sum that had already suffered "tax and were under no liability to make any further "deduction." So it was said here the respondent in handing over so much of the capital sum in his hand as was applicable for the payment of interest was handing over a sum from which tax had already been deducted; he had received and was paying only a tax-free sum and although the rest of the estate of the late Mrs. Beyfus (if there had been any) would have been liable for the tax so notionally deducted, the respondent was not. My Lords, the representatives of the Crown sought to distinguish that case from this on the ground that the mortgage agreement in the *Lawrence, Graham & Co.'s* case (2) stipulated for net interest only, whereas the present case stipulated for gross interest. Whether the mortgage deed in the former decision did require a payment of net interest only may perhaps be doubted, but whether it did so or not cannot, I think, affect the principles to be applied. If then the decision in that case be right the decision of the Court of Appeal in this case was right also. The Commissioners accordingly argued that if no valid distinction could be made, the case of *Lawrence, Graham & Co.* (2) should be overruled. My Lords, I cannot think that the provision contained in the mortgage deed now in question, whereby an option was given to the mortgagee to capitalize interest unpaid for twenty-one days after it became due, amounted to payment. As my noble and learned friend Lord Russell of Killowen, then Russell J., when dealing with the question of capitalized interest said in *In re Jauncey* (3): "In the case of such a provision as is contained in the present "deed, which enables the interest to be capitalized, the interest "is not capitalized because it is in fact paid but because it "has in fact not been paid." To the same effect Lord Sterndale M.R. in *In re Morris* (4), speaking of capitalization in a case where capitalization was not expressly provided for, said: "I think that the word 'capitalization' used in many of the "books quoted is a convenient word, but for the purposes for "which it has been used in the argument before us it is a

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(1) [1937] 2 K. B. 179.
(2) [1931] 2 K. B. 81.
(3) [1932] A. C. 624.

(1) [1937] 2 K. B. 179, 196.
(2) [1937] 2 K. B. 179.
(3) [1926] Ch. 471, 476.
(4) [1922] 1 Ch. 126, 133.

" fallacious word, because it is taken as referring to capitalization for all purposes, income tax and otherwise. I do not " think that is the meaning of the word. In my opinion—not " to beg the question—when these sums of interest come to be " paid at the end of the time when payment is made, although " interest has been charged upon them, and although, as a " matter of bookkeeping, they have from time to time been " added to capital, they do not cease to be interest of money— " that is to say, they are overdue interest upon which interest " has been paid." Had the sum in question in the present case been bank interest on a loan the question whether the interest there had been paid by adding it to the capital sum borrowed would have been determined by your Lordships' decision in *Paton* v. *Inland Revenue Commissioners* (1). At an earlier date, in *Inland Revenue Commissioners* v. *Holder* (2), the Court of Appeal had decided that the capitalization of bank interest ought properly to be regarded as a fresh borrowing of interest by the borrower from the bank followed by the application of the sum so notionally borrowed in payment of the interest due, with the result that there was a payment at the moment of capitalization. In *Paton's* case (1) your Lordships held that this was not so and that the debiting of interest in the account did not constitute, as between the borrower and the bank, a payment of interest under s. 36, sub-s. 1, of the Income Tax Act, 1918. My Lords, I do not find myself able to distinguish in principle between that case and the one the House is now considering. In each case there is a debt and in each case there is a contract under which, in default of payment, a so-called capitalization of interest takes place. It is true that in the one case the contract is constituted by the custom of bankers and in the other by a deed of mortgage, but the substance, though not the machinery, is the same. Capitalization means no more than that interest, which continues to be interest, shall be treated together with the capital sum due as itself interest-bearing but does not alter its quality as interest. There being then no payment until the funds were handed over in pursuance of the agreement of July 20, 1939, there could be no earlier deduction and up to that time no deduction of tax had in fact taken place. The respondent was therefore under an obligation to deduct from the sum paid to the mortgagee's trustees and account to the revenue for the tax then due unless for some other reason he was excused. It was sought to find such an

(1) [1938] A. C. 341. (2) [1931] 2 K. B. 81.

excuse by a contention that he had not handed over money and could not deduct money from an obligation which he had met by handing over a commodity. This argument, as to the merits of which I say nothing, fails in my view in limine. I think the Attorney-General was right when he said that under the agreement of June, 1939, the parties were not seeking to avoid payment in sterling—they were merely seeking to arrange a satisfactory position in which the respondent should retain part of the sum due in order to answer his liability (if any) to account for income tax. I would allow the appeal.

LORD SIMONDS. My Lords, the primary question for decision in this case, the facts of which I need not restate, is whether the capitalization by mortgagees of arrears of mortgage interest is for the purpose of r. 21 of the General Rules of the Income Tax Act, 1918, as amended by s. 26 of the Finance Act, 1927, to be regarded as payment by the mortgagor of such interest. The question is the same whether, as in the present case, the capitalization depends on the exercise by the mortgagee of a contractual right or, as is often the case, takes place automatically under the terms of the mortgage deed when interest is in arrear. This is a question of wide importance, and it is the avowed intention of this appeal to obtain a review of the decision of the Court of Appeal in *Inland Revenue Commissioners* v. *Lawrence, Graham & Co.* (1), which answered it in the affirmative. A further question, which has been much discussed in this appeal, but is necessary for decision only if your Lordships accept on the primary question the reasoning of the Court of Appeal, is whether the capitalized interest is the net interest which the mortgagor would pay if he in fact paid it, i.e. the interest less income tax, or the gross interest without deduction of tax. In the view which your Lordships take of the primary question, I do not find it necessary to express any final opinion on this second question. The Court of Appeal in the present case have, as I have indicated, followed their previous decision in *Lawrence, Graham & Co.'s* case (1). The ratio decidendi in that case is to be found in the excerpt from the judgment cited by Lord Greene M.R. in the present case (2), the conclusion of which is that (3): "a mortgagor and a mortgagee may validly agree "that, in the event of failure by the mortgagor to pay the net

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(1) [1937] 2 K. B. 179.
(2) (1944) 170 L. T. 289, 291.
(3) [1937] 2 K. B. 179, 195.

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" interest as it falls due, the mortgagee will from time to time " accept in full discharge of the mortgagors' liability to pay it, " a capital charge for a like amount upon the mortgaged " security. As and when each charge takes effect the tax will " have been deducted within the meaning of the rule [i.e. r. 21], " for the capital charge merely takes the place of a payment by " the mortgagor of the net amount and can never exceed that " net amount in money value." With so much of this citation as is concerned with the question of gross or net interest, I need not deal. But I must express my disagreement with that part of it which purports to be an analysis of what takes place when mortgage interest is capitalized, for it appears to me inaccurate and inconsistent with the reasoning which led to the decision of this House in *Paton* v. *Inland Revenue Commissioners* (1). The question in the simplest terms is whether, when the mortgagee capitalizes interest, the mortgagor pays it; and the answer, in terms as simple, is that the mortgagee capitalizes it just because the mortgagor does not pay it. It is not a form of payment: it is not a substitute for payment: the interest remains unpaid, but it is impressed with a new quality, viz., that it carries interest as if it were capital. The interest was always charged on the security: it adds nothing to speak of it as a capital charge. I will assume that a mortgagee may accept in full satisfaction of interest something that is not money but money's worth. But that assumption does not justify the further step in the reasoning of the Court of Appeal that capitalization of interest is payment of interest. I would accept as an accurate statement of that process the judgment of Lord Sterndale M.R. in *In re Morris* (2), and would respectfully adopt the observations made on that case by my noble and learned friend Lord Russell of Killowen in *In re Jauncey* (3).

My Lords, in the interval between the decision of *Lawrence, Graham & Co.'s* case (4) and that of the Court of Appeal in this case, *Paton's* case (5) came before your Lordships' House. I do not find any reference to the former in the latter case. But I cannot reconcile the two decisions. In *Paton's* case (5) the question was whether one who had borrowed money from his bankers "paid" the interest on that money when the bankers, in accordance with their usual practice, debited his account at the close of each half-year with that interest and

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(1) [1938] A. C. 341.
(2) [1922] 1 Ch. 126, 131, 132, 133.
(3) [1926] Ch. 471, 475, 476.
(4) [1937] 2 K. B. 179.
(5) [1938] A. C. 341.

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carried it forward as part of an aggregate interest-bearing debt. To that question this House unanimously answered No. Lord Atkin (1) cited with approval the observations of my noble and learned friend in *In re Jauncey* (2), to which I have already referred. My noble and learned friend Lord Macmillan, in words which I would venture to repeat as decisive equally of that case and this, said (3): " It is a condition of a claim for " repayment of tax on bank interest under s. 36, sub-s. 1 [of the " Income Tax Act, 1918] that the taxpayer shall have ' paid ' " to his bank the interest in respect of which he claims repay- " ment of tax. In my opinion this means that the taxpayer " must really, and not merely notionally, have paid the interest; " there must be payment such as to discharge the debt: the " payment must be a fact not a fiction." I can find no valid distinction between the so-called capitalization of interest under such a mortgage deed as that now under consideration, and the process of adding interest to capital with half-yearly rests according to the practice of bankers which was considered in *Paton's* case (4). If there is not payment of interest in the one case, so there is not in the other. I am willingly led to the conclusion that *Paton's* case (4) is an authority binding on your Lordships for the proposition that in this case there was no payment of interest when the mortgagees exercised their right of capitalization.

A further question has been raised whether the respondent was a person " by or through whom " the payment of interest was made, when upon the falling in of the reversion in the funds constituting the mortgagees' security the agreement of July 20, 1939, was reached and carried out. On this question I entertain no doubt and will do no more than concur in the opinions expressed by your Lordships. I concur in the motion that this appeal should be allowed.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Ranger, Burton & Frost.*

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(1) [1938] A. C. 351.
(2) [1926] Ch. 471, 475, 476.
(3) [1938] A. C. 356.
(4) Ibid. 341.

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